IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
W.R. GRACE & CO., *et al.*,	)	Case No. 01-1139 (JKF)
	)	
Debtors.	)	Jointly Administered
	)	
	)	**Objection Date: TBD.**
	)	**Hearing Date: TBD.**

NOTICE OF FILING OF EXHIBIT [Re: Docket No. 2804]

TO: All Parties on the Attached 2002 Service List

PLEASE TAKE NOTICE, that on October 11, 2002, the Official Committee of Asbestos Personal Injury Claimants (the "P.I. Committee") filed and served **The Official Committee of Asbestos Personal Injury Claimants' Motion for an Order Appointing A Trustee for W.R. Grace & Co. and Other Debtors Pursuant to 11 U.S.C. Section 1104(a) [Docket No. 2804]** (the "Motion"), with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 5th Floor, Wilmington, Delaware 19801.

PLEASE TAKE NOTICE, that on October 17, 2002, the P.I. Committee filed and served **Exhibit 32** to the Motion, with the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 5th Floor, Wilmington, Delaware 19801. A true and correct copy **of Exhibit 32** is attached hereto.

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Dated: October 17, 2002

EXHIBIT 32

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

IN RE:	CHAPTER 11
	Case Nos. 01-1139 through
W.R. GRACE & CO., et al.,	01-1200
Debtors.	
OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS and OFFICIAL COMMITTEE OF ASBESTOS PROPERTY DAMAGE CLAIMANTS OF W.R. GRACE & CO., suing in behalf of the Chapter 11 Bankruptcy Estate of W.R. GRACE & CO., et al.,	Adv. No. 02-2210
Plaintiffs,	
vs.	
SEALED AIR CORPORATION and CRYOVAC, INC.,	
Defendants	

October 7, 2002
Newark, New Jersey

B E F O R E: HONORABLE ALFRED M. WOLIN, USDJ

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

JACQUELINE KASHMER
Official Court Reporter

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OFFICIAL COURT REPORTER
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OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS and OFFICIAL COMMITTEE OF ASBESTOS PROPERTY DAMAGE CLAIMANTS OF W.R. GRACE & CO., suing in behalf of the Chapter 11 Bankruptcy Estate of W.R. GRACE & CO., et al.,

Plaintiffs,

vs.

FRESENIUS MEDICAL CARE HOLDINGS, INC. And NATIONAL MEDICAL CARE, INC.,

Defendants.

Adv. No. 02-2211

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UNITED STATES TRUSTEE

BY: FRANK PURCH, ESQ.,
and
ROBERTA DeANGELIS, ESQ.

THE COURT: Welcome to another edition of hard ball. As Chris Matthews says, that sometime I'm going to tell you what I really think, but not at the beginning.

I'd like to thank everybody for being here. I have your appearances. You've all had a lot of time to think about the solution to the problem and I want to hear from you today because I really want to make a record.

I received all of your thoughtful letters and from those letters there are certain inevitable truths that emerge that -- nobody has to write this down, Mr. Baena, don't write it down, it's not that inevitable or ultimate.

There's certain truths that exist that will guide the Court, and the first of those is that whatever we do, people want finality. There has to be finality.

The second is that in zero to six months, when we got this case ready for September 30th, people expended much time, effort, thought, resources, and I believe that it would be wasteful not to pursue this case diligently and promptly. So, it probably means that for those people who will argue for including this particular action in a plan of confirmation to be litigated by a representative who knows when, I'm not seriously thinking about that, and some of the options that have been presented to the Court are the appointment of a trustee. Well, that's mainstream. If you read Cybergenics, you know that's not really rocket science

because debtor-in-possession or trustee, we all understand what they mean.

There's been a proposal for a limited trustee, proposal for an examiner, proposal for a declaratory judgment. I would like to hear today people argue the issue of waiver on behalf of the debtor-in-possession and Sealed Air, that they waived whatever defense they could have raised as to the capacity to sue by the committees because Cybergenics is an affirmance of a lower court opinion. It was out there. It was up in the Circuit once before, so, it shouldn't have been a surprise to everyone, so, there's an issue of waiver.

The Court has also given great thought to an expedited appeal that, because of the action taken by all concerned, the trial date of September 30, the opinion coming out on September 20, the projected cost to the estate, and I would imagine that, I haven't seen any figures but I wouldn't be surprised if counsel fees in the last six months for all parties would approximate ten million dollars, and it would be terribly wasteful not to pursue this case promptly, so, there should be an expedited, potentially an expedited appeal to the Third Circuit Court of Appeals as to maybe relief from the stricture of the Cybergenics opinion.

I also understand, I haven't had an opportunity to

read it, but that there's an application en banc in Cybergenics that was recently filed. Mr. Bernick, obviously, you haven't seen it, either.

MR. BERNICK: I have glimpsed it in hard copy but I have not read it.

THE COURT: Then I misread your body language. But in any event, if the feelings of the bankruptcy bar could be converted into some type of force, then Cybergenics, from what I've heard, would be blown away into nothingness.

I haven't heard one bankruptcy practitioner speak in favor of Cybergenics, and I will not call on any particular bankruptcy practitioner to express his or her opinion.

So, we have all these options here today. I want to tell you one thing that I'm thinking about, and I hope this invites a mandamus or something like that. I'm going to set a trial date of December 2nd, and unless somebody mandamuses me or whatever, we're going to go ahead on December 2nd.

Now, in the order I'd like to hear from people today, I understand there's a representative here from the United States Trustee's Office, whom I do not know. Is it going to be you, Mr. Purch, or someone else?

MR. PURCH: Yes, your Honor.

THE COURT: I just wasn't sure. The United States

Trustee filed a memorandum, and I don't know if anybody had an opportunity to read the memorandum. Did everybody get the United States Trustee's memorandum?

Okay. Fine. Then we know what it says. I thought it was a thoughtful memorandum and it raises many of the questions that the Court had given some thought to in advance of the memorandum, but I won't take credit for them. I'll let the United States Trustee take credit and, so, Mr. Purch, if you want to address the Court, you may. And what I'm really looking to accomplish today is not just some academic exercise, but I also want to make a real record, because together with what we did on, I guess it was September 24, that transcript, I want this transcript to exist, and I want both transcripts to go up to the Third Circuit Court of Appeals on some expedited basis.

Mr. Purch, I'll hear from you, sir.

MR. PURCH: Thank you very much, your Honor. Good afternoon. May it please the Court, Frank Purch for the United States Trustee. With me today is Roberta DeAngelis, the Assistant U.S. Trustee for the District of Delaware, and also Robert Schneider, another trial attorney assigned to the Newark office who has been assisting us on the briefing of these matters.

Your Honor, we think, as we expressed in our memorandum, that the first thing that can be done in the

posture in which we find ourselves here is take a breath because --

THE COURT: We did that. Last week we took a breath.

MR. PURCH: We can take another breath, your Honor, because a petition has been filed in the Circuit for rehearing en banc of the Cybergenics case. I would imagine that we will hear quickly whether or not the Court will entertain the petition for rehearing.

If the Court chooses not to entertain the petition for rehearing, then we know what the landscape is. We know that the decision stands and we can go forward on that basis. If the Court chooses to entertain the petition for rehearing, presumably at that point also the Court will give some indication of what type of briefing and argument schedule will pertain to the rehearing and, therefore, there might be some context, and I don't want to go too far out on a limb --

THE COURT: What time period do you project that it be; two months, three months?

MR. PURCH: Well, as I said, it's speculative right now. If the Court grants a rehearing, how much time they'll allow for briefing and argument and how much time might go before an opinion issues --

THE COURT: Let me ask you this question. If that

be the case, mandate hasn't issued, the matter is up on appeal, why can't I try the case?

MR. PURCH: That would be one option.

THE COURT: Because it's not the law in the Third Circuit until the mandate issues.

MR. PURCH: I think that's one option that's available. What I think would be appropriate is whether -- let's first find out whether a rehearing is going to occur. If it's going to be denied, then we know what that means. If it is going to occur, at that point, your Honor, you could decide whether, after inquiry, perhaps more briefing from the parties, whether it would be appropriate to continue the matter further or whether it would be appropriate, your Honor, to proceed with the trial under some proceeding with the existing parties, or whether it would be appropriate for your Honor to make some determination at that point regarding who the proper parties to the trial are.

THE COURT: Well, Mr. Purch, Mr. Wasserstein and I, we're getting older, we're getting on in years, so, therefore, why can't we proceed on a dual track?

MR. PURCH: I think you can, and that was going to be my second point, your Honor. I think there are issues that can be addressed right away, and I think the first issue that should be addressed, which did not seem to us to

have been addressed to date by the parties in the submissions and in the argument on September 24, is the question of whether, in fact, the defense of suit not being brought by the real party-in-interest is still available to the defendants or whether it has been waived due to the fact that they did not raise that defense in their answer to the complaint.

Their answer to the complaint raised a defense of lack of standing but the Cybergenics decision expressly states it's not a standing decision.

I did a little bit of quick research, and these cases are not in the memorandum because I found them this morning. There are at least two cases that I found just doing some very quick research that indicate that the issue of lack of the real party-in-interest is a waivable defense.

One is the Third Circuit decision from 1994 called Allegheny International versus Allegheny Ludlam Steel. Its cite is 40 F. 3rd, 1416. There's an Eastern District of Pennsylvania case, it's an old case from 1953 but it still appears to be good law, called McLouth, M-c-L-o-u-t-h, versus Mesta Machine Company and the cite is 116 F. Sup. 689, and the reason why I dredge up that somewhat older case is that that is a situation that specifically involved an attempt to raise the defense four days before trial, which is very much the sort of situation --

THE COURT: Nobody follows Fed Sup. cases. You know that. Right?

MR. PURCH: But the Third Circuit issue from 1994 much more recently is in line with that, and what I suggest, your Honor, is that what can happen, even while a petition for rehearing is pending, is that your Honor could direct the parties to brief the issue of whether the defense has been waived. I'm not suggesting your Honor should decide it today. I think Sealed Air should have an opportunity to state their opinion on it. The committee plaintiffs should have an opportunity to state their position.

Your Honor, I don't expect Sealed Air to concede to waive a defense.

THE COURT: Anything is possible.

MR. PURCH: But I don't expect them to concede anything. I think that probably with the possible exception of simply appointing a plenary trustee, which is exactly what Cybergenics says, with the possible exception of that, I would expect Sealed Air's counsel obviously to want to protect their client's interests and, so, we're going to have to proceed under the assumption that Sealed Air is going to at least reserve its rights to challenge whatever other decision might be made.

The question, therefore, your Honor, is, as we've suggested in our memorandum, what is it that can be done in

this context if Cybergenics stands. What can be done in this context that is most consistent with Cybergenics. Since I don't view anything in Cybergenics as intending to change the law on Rule 17(a) and, therefore, intending to change the law that real party-of-interest is a waivable defense, I think that a determination that Sealed Air has waived the defense or determination that it has not waived the defense is a determination that the Court can make that's fully consistent with Cybergenics.

In fact, considering the discussion in a somewhat different posture that exists in the Cybergenics opinion of the 17(a) issue presented there, the committee had not moved for a trustee even though they knew that the issue was live and so on. It's the same sort of argument that exists here.

Looking at the other options, your Honor, that have been proposed, we certainly share the Court's concerns about efficiency and finality and, therefore, once again, if Cybergenics stands, we have some serious questions about some of the other options that have been proposed.

With respect to the concept of having an examiner being given enough of the trustee powers to pursue these fraudulent conveyance actions, that certainly is facially appealing in the sense that, yes, the bankruptcy code does under Section 1106 create the possibility that an examiner can be assigned certain trustee duties.

The difficulty that we have in viewing that and in getting a comfort level about that is that assuming that you can delegate these kinds of duties to an examiner, it doesn't appear to be something that the Third Circuit contemplated because the Third Circuit spent a lot of time and a lot of struggle interpreting the phrase "the trustee may" under Section 544(b), "the trustee may seek to avoid a transfer", and the Third Circuit says trustee obviously means the trustee, and the Third Circuit says that under Section 1107, the debtor-in-possession, unless those duties are taken away, has certain duties of a trustee.

THE COURT: Did you ever see the briefs in Cybergenics? I never saw the briefs.

MR. PURCH: I never saw the briefs, your Honor.

THE COURT: Because perhaps the Court did not opine on an examiner or a limited trustee because it was never before them.

MR. PURCH: That's possible, although the type of statutory analysis reasoning that the Court uses would tend to lead one, in our opinion, to the conclusion that if we say one thing, we don't mean something else that we could have added to that list but we didn't, because that's really, therefore, the Court's way of interpreting the statute.

THE COURT: Well, potentially they read Hartford

with comfort and felt they didn't have to go any further.

MR. PURCH: But they read Hartford to say trustee means trustee and debtor-in-possession, not trustee and debtor-in-possession and examiner given certain trustee powers under 1106, and given the way that the Circuit seems then to have spent some time talking about, well, what other options, and that phraseology is even used in the opinion somewhere, these are other options that could have been available to the committee, it would strike me that if someone were going to try and look at what options might be available, that this was one that might have been on their list of options but might not.

The point, your Honor, is ultimately that while we can have this discussion about what they might have meant, what we're buying, of course, is a rather involved, potentially involved appellate process of determining on a proceeding brought by Sealed Air to raise the issue whether an examiner is within the scope of what the Cybergenics --

THE COURT: So, the premise of your argument is what you see is what you get.

MR. PURCH: We're all safe if we stay at that point. My point, your Honor, is that if we want to do something that's safe, as safe as we can possibly make it, as certain as we can possibly make it, we ought to stay within the safe zone, and this is strained beyond the safe

zone.

THE COURT: And you say the same thing about a limited trustee?

MR. PURCH: Your Honor, our argument about a limited purpose trustee is set forth in our papers. The difficulty that we have with it, notwithstanding the fact that there are a couple of cases which we cited where something like that was ordered, is that it doesn't really seem to be consistent with what the code provides for.

It would seem that the code fairly contemplated that when a trustee is appointed, that a trustee takes possession of all the assets of the estate. The trustee's compensation is, in fact, based upon the presumption that the trustee has control of the assets, and, furthermore, if you take a look at Section 1105, Section 1105, in fact, provides for a mechanism for the trustee, upon request of a party-of-interest, the trustee's appointment to be terminated and the debtor restored to possession. Everything that you read in the code presumes that when a trustee is appointed, the trustee takes possession.

What we've stated, your Honor, is that we don't think the reasoning of the cases that purported to create a limited purpose trustee is sound. In fact, of the three cases involved, only one attempts to come up with any rationale, and that's the Intercat case from Georgia, and

the Intercat case, in our opinion, really goes at it backwards by using 1107, which defines the duties of debtor-in-possession, to back into what the duties of a trustee might be, and the Intercat court ruled that, well, because under 1107 the Court has the power to take duties away from the debtor-in-possession, they got to go somewhere else, and we'll say they can go to a trustee, but the code in fact says where they go, they go to an examiner, because Section 1106(d) says that the Court may direct the examiner to perform any duties of the trustee which the debtor-in-possession is directed not to perform, which, once again, if the Third Circuit had said an examiner worked, this all would be a lot easier.

Your Honor, we then are left with -- one more point about concept of a limited purpose trustee. I'm sure that you'll hear from the debtor, as the debtor has indicated before, that appointment of the trustee has potential for all sorts of bad things to happen in the case and the trustee really has -- the flip side, as it were, in fact, that the code does not contemplate any limits on the powers of the trustee, any limits on the statutory powers, is that the trustee has a fiduciary duty and discretion in how to exercise his or her powers.

The trustee is not required to fire all the employees, is not required to show all the management to the

door. The trustee is not required to totally change the way the business operates.

THE COURT: That's one side of the coin and that's what you argue in your memorandum to the Court, but the other side of the coin may be acts may occur over which the trustee doesn't take any act or control, like maybe management contracts are abrogated and management says, by the way, we're not staying on with the trustee, so, you've got no management, DIP financing may evaporate, because appointing of a trustee may be regarded as an act of default.

People who deal with a particular company when confronted with a trustee to operate with no management and DIP financing evaporated may be concerned about the ability of the corporation to meet its commitments in terms of its business.

MR. PURCH: I have a couple of responses to that. One is, of course, that to the extent that these types of doomsday clauses were things that were approved by the bankruptcy court in the course of the bankruptcy process, there certainly, I think, would be the opportunity for the trustee to come to the Court and seek relief or modification from some of the effects of these provisions.

Secondly, with respect to the effects of the trustee --

THE COURT: Wait. Let's take DIP financing. The trustee can come to me and argue till the trustee is blue in the face and I could be sympathetic, and the hard-nose banks say, ut-uh, we're pulling our financing.

MR. PURCH: The banks may have the negative ability to do that. We have to decide in this, as in many instances, your Honor, whether we're going to presume that people will act in an economically irrational way or whether they'll act in an economically rational way. Is it economically rational for the banks to suddenly yank the financing and plunge the debtor into nothingness? Will the banks ever see their money back?

THE COURT: I don't know. What will ensue is probably a Chapter 7 dissolution and the banks may or may not get their money. I don't know.

MR. PURCH: There have been trustees appointed in some many, many large cases and trustees have operated businesses in many large cases.

Another point about this, your Honor, is obviously we're having this discussion based on the assumption that we may find that we have to make -- that the Third Circuit's decision is law and we have to deal with it where it is.

While I'm not going to try to get inside the head of the panel judges and explain exactly how they came to this rationale, I will say that certainly I think we can

presume that the judges were aware that there is an existing legal standard under Section 1104 for appointment of a trustee, and that when the Third Circuit speaks in the Cybergenics case that either a debtor-in-possession or a trustee has to bring an action, that doesn't mean, I don't think, and I don't see anything in the opinion that suggests that if there's a disagreement between the debtor-in-possession and certain creditors about whether an action should be brought, that automatically a trustee should be appointed. There needs to be cause found.

Section 1104 still exists and there's a body of law under Section 1104 that requires a court to make a determination whether there are grounds for appointment of a trustee, either under the first prong, the gross mismanagement, incompetence, dereliction of duty prong, or, alternatively, the best interests of creditors. So that all of these factors that are discussed about the potential effects of the financing and so on and so forth are all factors that the Court would need to address in determining under Section 1104 whether grounds exist to appoint a trustee.

Does that mean if the Court determines that grounds do not exist, that if it would not be in the interest of the creditors to appoint a trustee, does that mean potentially there might not be a plaintiff to bring this suit? That's

one of the factors to be considered. But ultimately a party would have to file a motion and I guess it would be the current plaintiff committees who would file the motion to appoint a trustee, and they would set forth their arguments as to why a trustee should be appointed, why it would be in the best interests of creditors for a trustee to be appointed so that this action can go forward, and they would argue that there are ways to protect or ameliorate these potential consequences and that the benefits outweigh the risks.

That would be what the Court would be asked to consider. I'm not asking, because I don't think that the Circuit's opinion suggests that appointment of a trustee should be automatic. I don't think the Circuit even contemplates that if there is a difference of opinion between the debtor-in-possession and creditors about whether to bring a suit, that automatically a trustee should be appointed, automatically the suit should be brought.

THE COURT: Do you think that -- you're experienced in bankruptcy matters. I'm the new guy on the block. Was there some overriding concern of the Third Circuit in arriving at the Cybergenics opinion in the manner in which they did?

MR. PURCH: Your Honor, I am very, very reluctant to try and tackle that question because it puts me in the

situation of trying to do what I said I was reluctant to do, which is to get into the minds of the judges.

THE COURT: Okay.

MR. PURCH: But clearly they felt some concern. Well, they felt some concern about the statute being interpreted in a consistent way and, obviously, they believed that one could correspond the words in 506(a) to the words in 544(b). That's the decision they made in a certain sense if it --

THE COURT: Was there a potential, the potential concern that perhaps the bringing of fraudulent conveyance actions by committees was abused?

MR. PURCH: Since, once again, I'm not privy to the briefs or the arguments before Cybergenics, I don't want to really speculate as to whether that was one of the arguments raised. I don't know if that was something that anybody else here is more familiar with.

As a matter of fact, my colleague from the New Jersey office might even be able to whisper something in my ear about that, I don't know, but Cybergenics being the case that originated in New Jersey, it's not a case that originated in Wilmington, so, I'm not directly familiar with the proceedings below.

THE COURT: I'm really not talking about Cybergenics in particular. I'm talking about bankruptcy.

You've been counsel to the U.S. Trustee for a period of time.

MR. PURCH: Three years.

THE COURT: In your three years you've seen many committee actions brought alleging fraudulent conveyance. True?

MR. PURCH: I've seen them and it's something that generally has been relatively routine. It is in part a side effect of cases taking a long time to resolve.

If you can get plan confirmed before the two years run, you don't have to deal with the issue in this unfortunate context.

The much more typical context, your Honor, is the context that Judge Fitzgerald was faced with in Owens-Corning a couple of weeks ago where there were initially, although the ones that were left at the end were not these, but it started out with a dispute over the usual sort of thing where the debtor's reluctant to commence preference actions against parties that it's continuing to do business with, ongoing vendors, for the fear that it will disrupt the business relationship with those vendors, and what you say in Owens-Corning was somewhat of a different ramification of that, where that was one of the group of actions initially when the motions were first filed but then later evolved to actions against certain asbestos plaintiff

law firms which, of course, are the constituencies with which the debtor would need to negotiate to formulate a plan, but it wasn't quite the same type of conflict that this case creates and it's the unfortunate, unfortunate situation in this case that it appears very difficult, maybe impossible, to do what ultimately was the resolution of Owens-Corning. The whole bullet was dodged because ultimately the debtor said they could file the actions.

Here, unfortunately, we have a debtor saying we are simply unwilling to file the action because in order to file the action or take over as plaintiff in the action, we would need to take a position vis-a-vis the estimation of asbestos liability that is diametrically opposite to our entire strategy in the case and, so, unfortunately, I have a concern that as much as I might like to be here, your Honor, and say do the same thing Judge Fitzgerald did in Owens-Corning, direct the debtor to do it, I'm not sure that if you did, they would do it, or if they did, they would do a good job.

THE COURT: They can't do it.

MR. PURCH: I understand the problem. I understand the problem.

THE COURT: The conflict would be extreme.

MR. PURCH: That's what makes this very unusual. So, when you ask me, your Honor, to somehow take my

experience and relate it to this case, that's why I have a problem. That's what makes this case very unusual.

There are disagreements in other cases but there are usually ways to resolve the disagreements within the context of the debtor carrying most of the laboring oar.

THE COURT: So, if you think we find a solution to do a good job, that we can make this a semester course at law school like Enron?

MR. PURCH: It probably is already working its way into a number of professors' syllabi, I'm sure.

THE COURT: All right. I understand your argument.

MR. PURCH: And just one last point, your Honor, with respect to the concept of a declaratory judgment action, is that --

THE COURT: We just put that out. We wanted a dialogue here today. Okay. I have a concern about a case in controversy. Okay.

MR. PURCH: I'll just stand on my papers as far as the concerns that we have about that action. Thank you very much, your Honor.

THE COURT: Thank you. Mr. Friedman, I call on you next, or Mr. Inselbuch.

MR. FRIEDMAN: I'll defer to the committees, I think, to present each of our arguments, if that's all right.

THE COURT: All right. Mr. Baena.

MR. BAENA. May it please the Court, Scott Baena on behalf of the Asbestos Property Damage Committee. Your Honor, I'm going first because Mr. Inselbuch is on a diet. He needs to recover a little bit of strength before he gets up here.

THE COURT: I thought maybe you were going before Mr. Inselbuch because you've got an early plane back to Boca Raton.

MR. BAENA: No, sir. I'm not leaving until he speaks.

THE COURT: I think that's wise.

MR. BAENA: Your Honor, given the choice between receiving the Cybergenics opinion a week before the trial or a week after the trial, as bad as the opinion was, in our opinion, I rather have received it when we did so that we can confront the problem that it does present.

I will tell you that having just returned from the national conference of bankruptcy judges, I've yet to hear a bankruptcy judge or practitioner have anything good to say about the opinion and its implications in the practice of bankruptcy law, so, everybody is watching and everybody is very curious about what we're going to do here.

I would like to use this time, Judge, to cover two things just a briefly. First of all, address the proposed

case management order short of the declaratory judgment issue that you have already raised and, secondly, offer some other suggestions and observations that the Court might wish to take under consideration.

Judge, we ruminated about the Court's proposal long and hard and don't easily come to be critics of anything the Court proposes, but we do think that there are several infirmities with the proposal, not the least of which is that it directly contradicts Cybergenics, and if what we do here is an effort to overcome Cybergenics or live within its strictures, I think the case management proposal, in all due respect, sets us in the wrong direction.

The notion that the committees at the outset could be sued is directly inconsistent with the express remarks of the Third Circuit.

THE COURT: Well, they could be sued but their capacity to sue as a counterclaimant and as a third-party plaintiff against Sealed Air is problematic.

MR. BAENA: Is problematic, and even being sued, Judge --

THE COURT: But we got you thinking, didn't we?

MR. BAENA: Yes, very provocative.

THE COURT: I wanted a dialogue to hear.

MR. BAENA: Just to finish that thought, though, the only authority I'm familiar with for committees being sued

is when they've breached their fiduciary duty, not in whether to promote some sort of cause of action.

THE COURT: Mr. Bernick would love to sue you.

MR. BAENA: I'm sure he would. And I think Mr. Purch makes another good point in his response to the effect that the relief that we would be seeking exceeds the kind of relief that could be granted in the construct of the proposed case management order because we want them out of --

THE COURT: Well, there would have to be a second count.

MR. BAENA: There would have to be a second count and then we get into a whole new slippery slope.

THE COURT: If there were a fraudulent conveyance, then you get a limited judgment, I understand.

MR. BAENA: So, we start from that point, your Honor, with some further observations and suggestions. The points you made at the beginning of this hearing regarding the sense of urgency that we ought to have because of the time and the expense that all have gone to in order to promote this case and the importance of this case are poignant for a number of reasons but, most importantly, because that is, when synthesized, an expression of this case represents something that needs to be done in the best interests of this estate.

We are past a point where it's even apparently debated by any side that the prosecution of this case is undoubtedly in the best interests of this estate.

Just this week we received a pleading from the Equity Committee which recognizes in its papers that there has already been a determination that this litigation is in the best interests of this estate. Given that there doesn't appear to be any reasonable disagreement about that fact, it's very easy for us to conclude that this litigation needs to go forward and there are, looking at this through absolute rose-colored glasses, if you will, there are really two ways that we know that we can proceed listening to the Court in Cybergenics.

The first is that the debtor brings this cause of action and if the debtor doesn't, the trustee gets appointed. We know that those are unassailable.

THE COURT: The debtor can't bring it in this case.

MR. BAENA: The debtor can't bring it, but if the debtor doesn't bring it, it only has one other choice and, that is, to not be involved. Cybergenics isn't all black crepe for us. There's a positive side to Cybergenics. It's hard to find, but the positive aspect of Cybergenics is that it promotes the same judicial philosophy as the Supreme Court did in the Weintraub case when it talked about the fiduciary duties of debtor, and when you have already

concluded, and there doesn't appear to be any reasonable dispute about it, that this litigation is in the best interests of this estate, then it is inescapable to not conclude that the debtor has a fiduciary duty to pursue this litigation. And if the debtor refuses to do so, Cybergenics tells us there's one path we can take. We can appoint a trustee. But implicit in that is the debtor can't be on both sides of this equation. The debtor has to be out of this litigation. Kirkland & Ellis cannot be in this litigation. Those are immutable principles that come out of Weintraub.

THE COURT: What would you say if the debtor-in-possession said, all right, listen, we've read Cybergenics and we understand what the options are. Judge, if you remember, we made an application to you to vacate our intervention. Vacate our intervention and we'll now bring the action against Sealed Air, as unappealing as it may be. What if they do that?

MR. BAENA: That's why even the Third Circuit starting with Marin says there's an absolute right of the committees to intervene, to be sure that that --

THE COURT: Fine.

MR. BAENA: -- action is prosecuted appropriately.

THE COURT: We're not talking about your right to intervene. Your right to intervene is clearly established.

But it's your capacity to sue and initiate that Cybergenics attacks.

Now, Mr. Bernick, on behalf of Grace, says, okay, hey, listen, I read Cybergenics the way you all do and I spoke to my clients and we reconsidered, Judge. We want you to terminate our intervention and as the debtor-in-possession we are going to bring this action and we know that the committees are going to be here, they're going to intervene and they're going to keep us honest and pursue the case.

MR. BAENA: I could live with that.

THE COURT: You could live with that?

MR. BAENA: But it changes the whole landscape of this case.

THE COURT: Why?

MR. BAENA: It changes the whole landscape of this case because --

THE COURT: Tell me how.

MR. BAENA: -- their witnesses now become the estate's witnesses.

THE COURT: Their witnesses?

MR. BAENA: Yes. They promoted witnesses to testify in defense of the claims against Sealed Air.

THE COURT: Okay.

MR. BAENA: Those witnesses are now our witnesses.

THE COURT: Well, let's assume, you know, I can't speak for Mr. Bernick, he's his own bright light. Right, Mr. Bernick? He determines that, okay, he's going to bring it, and then he sits down with you and Mr. Friedman and Mr. Inselbuch and he says, hey, guys, I brought the action. Okay. It says here fraudulent conveyance, whatever, and he stands up on the day of trial and says, I yield my time to Mr. Friedman and the committees. Okay. I'm not calling any witnesses. All right?

Of course, we haven't heard from Mr. Wasserstein over there, who's going to say conflict of interest. We shared our litigation strategy with him. We relied upon him that he was going to make certain presentations. Now we need 640 days to work it out.

MR. BAENA: Judge, Mr. Bernick is out of this litigation. There is no way to hypothesize a scenario where Mr. Bernick and Kirkland & Ellis can be --

THE COURT: You just told me that if I read Cybergenics, I can have the debtor-in-possession bring the action. He now says I'm going to bring it.

MR. BAENA: I didn't say he could bring the action. The estate can bring this action.

THE COURT: Grace.

MR. BAENA: Grace can bring this action, yes. Cybergenics says they absolutely have the right to bring the

action.

THE COURT: So, Grace terminates Kirkland & Ellis and in walks ABC, and they bring the action on behalf of Grace -- right -- as debtor-in-possession?

MR. BAENA: You may well have counsel that's able to prosecute this claim already involved in this case.

THE COURT: Well, there is counsel in here who can prosecute the case. What do you get by knocking Kirkland & Ellis out if they decided that they're going to represent the debtor-in-possession?

MR. BAENA: Judge, you know, I don't know how to quantify what I get out of it.

THE COURT: Don't quantify. Just articulate it.

MR. BAENA: Your Honor, what I do is disabuse this case of the conflicts that they have created by virtue of their failure to comply with their fiduciary duty in bringing this case in the first place or stepping aside.

THE COURT: What if the -- you know, you discount the fact, you know, I make no findings at this point that they believe they entered into a bona fide transaction for an equivalent value and that they were solvent at the time.

Now comes down Cybergenics and they say, hum, notwithstanding what we said, we understand our obligation to the estate so we're going to be Boy Scouts, we're going to bring the action.

MR. BAENA: Judge, the unfortunate part --

THE COURT: What are you going to do? Now we got Mr. Bernick prosecuting the action, and on the first day of trial I say, Mr. Bernick, you may proceed. He says, Judge, I yield my time to Mr. Baena.

MR. BAENA: Respectfully, your Honor, the problem is that we got into these ski bindings when we allowed them to intervene in the first place. That was something that they shouldn't have been allowed to do.

THE COURT: How can I keep them out? How can I keep them out? You know, if you remember, I kept them out the first time.

MR. BAENA: They had a fiduciary duty not to come in. It would be a breach of their fiduciary duty to participate in this litigation by aligning themselves with the transferee. That's what all the case law tells you, right through Cybergenics.

If you determine that this litigation is worth prosecuting and, therefore, in the best interests of the estate, they had no right to be on the other side of this litigation. That was the problem.

THE COURT: Could we start a suit against Kirkland & Ellis and recover?

MR. BAENA: You know, Judge, I don't take any of this lightly and I don't -- I certainly don't, you know,

issue veiled threats, but one of the things the Court has to consider --

THE COURT: Should Mr. Bernick be calling his malpractice carrier?

MR. BAENA: Maybe. I'm not the right one to answer that question, Judge, and maybe you ought to appoint an examiner to determine that, Judge. That's what examiners do.

THE COURT: That's what we need, another level of bureaucracy in the case.

MR. BAENA: Judge, we're trying to work within the confines of a case that defies common bankruptcy practice. We're also trying to work within the confines of a statute.

THE COURT: We're having this exchange. If I had the opportunity, if Cybergenics came down last week and we were writing on a clean slate and we hadn't done the last six months of getting the case ready with all the history of this case, it would be a much easier problem to deal with.

We're on the eve of trial and out comes Cybergenics and everybody is committed to position. That's the difficulty about the case, you know, so, you and I can engage in this colloquy and speak academics and what if.

MR. BAENA: And speculate about what the Third Circuit is going to do en banc, and if they don't do anything, what the implications are to us then, and it's

purely speculation.

But we don't have to speculate about the fact that the case law makes it abundantly clear, and we're talking about the United States Supreme Court, not talking about the Third Circuit, that they had a fiduciary duty to pursue this litigation.

THE COURT: All right. And they're not going to do it.

MR. BAENA: And they're not going to do it. They can't participate any longer.

THE COURT: And Main Street is the trustee. Right? Main Street is the trustee.

MR. BAENA: We think, Judge, that the alternatives at this point to get to a trial on December 2 are even more limited than what was suggested in our papers.

We either leave everything the way it is, hope for the best in the Third Circuit, or we reconfigure the parties in the case. We know what kind of reconfiguration has to go on.

THE COURT: There's another solution but nobody ever mentions it. Right? Mr. Inselbuch just said the magic word. Settlement.

MR. BAENA: That would be a wonderful result for everyone, Judge. As you well know, we've made efforts. It does seem to me, though, your Honor, that if we proceed with

the case in the present posture, we decide not to reconfigure the parties, it is a very serious question for the Court even then as to what the role of Kirkland & Ellis will be and we have to focus on that.

And secondly, we have to leave ourselves in some position of denial at the end of the day if nothing happens at the Third Circuit --

THE COURT: Let me ask you this. If there were an appeal of the Third Circuit, an expedited appeal to exclude you from the confines of Cybergenics, and they said, all right, you know, this case was ready, we'll make an exception to this case, we'll make it prospective, however they say it, why do you have to get rid of Kirkland & Ellis at that point?

MR. BAENA: Well, who's appealing and what's on appeal?

THE COURT: You're going to appeal.

MR. BAENA: Judge, I don't think I could ever take an appeal that would put me in the position of having to support Cybergenics.

THE COURT: No. You're going to take an appeal that says something to the effect, A, the defense waived the defense of lack of capacity to sue. You'll probably take an appeal saying, you know, with all this time and money spent and effort, Cybergenics should not apply to this case.

Okay. Why wouldn't you do that?

MR. BAENA: I'm not sure how we get that. You enter an order, your Honor, today that says we're going forward?

THE COURT: Oh, yes. And by the way, I set a trial date and we're going forward.

MR. BAENA: We're going forward on December 2nd?

THE COURT: That's correct.

MR. BAENA: And everything is going to stay the way it is because I perceive that there is some exception that this case may fall into from Cybergenics?

THE COURT: Either waiver, exception, whatever the case may be. Doesn't that excite your appellate juices?

MR. BAENA: Well, I don't know what I'm appealing. What do I appeal, Judge? Do I go and say, no, I'm not within an exception to Cybergenics?

THE COURT: You're appealing this trial date of December 2nd, saying I don't want to go to a trial that may cost ten million dollars and potentially minimize the estate by ten million dollars, that may be monies that would accrue to your constituencies. Maybe it goes to a cross appeal because Mr. Wasserstein is probably going to appeal.

MR. BAENA: I think that that appeal, Judge, would engender the plaintiffs, the present plaintiffs, saying that they subscribe or Cybergenics is applicable. What you're

saying is it's not applicable and you're saying we ought to take an appeal because we don't want to be wasteful and we'd have to start that argument, the platform for that argument is that Cybergenics is applicable. Then you would hear from us to say that Cybergenics was correct. I can't say that.

THE COURT: Why can't you argue in the alternative? You might not know whether Cybergenics applies to this case, but if it should be construed to be retrospective as opposed to prospective, then we seek that we be excluded from the dictate of this opinion because of what it means to the estate.

MR. BAENA: But you will have ruled that it was excluded from the jaws of Cybergenics.

THE COURT: All I'm doing is establishing a trial date, and I'm inviting you to take an expedited appeal, mandamus me, whatever. It's not going to stop here or else on December 2nd everybody be ready and we're just going to go forward.

Maybe the U.S. Trustee will file something. I don't know. I want somebody to file something.

MR. BAENA: I'll defer to Mr. Inselbuch. I don't perceive the appeal that we could take.

THE COURT: Well, Mr. Inselbuch is going the tell you about it.

MR. BAENA: Thank you. Judge, if I could just

remark on the practical implications of appointment of a trustee --

THE COURT: Sure.

MR. BAENA: I'm not even -- first of all, I don't believe that the DIP financing order in this case provided for an automatic event of default. I think there is still notice and hearing required, which implies some judicial discretion as to whether or not to grant relief to the creditor; and, secondly, I'm not even sure that there's very much money outstanding under the DIP financing in this case --

THE COURT: I don't know.

MR. BAENA: -- if any. Thank you.

THE COURT: All right.

MR. INSELBUCH: Good afternoon, your Honor. Elihu Inselbuch for the Personal Injury Committee. If we take the syllogism that you present, you've ordered the case on for trial and we try the case and it ultimately goes up on appeal, the result of that trial will stand, as we look at the record today, if, one, the Third Circuit were to decide for some reason that Cybergenics was to be viewed prospectively or for some other reason didn't apply to this case, or if the Third Circuit were persuaded that the parties who would be then taking an appeal had waived their rights to that appeal by their conduct up to the time of

trial.

THE COURT: Or if the Third Circuit en banc vacated Cybergenics.

MR. INSELBUCH: Yes. If there's a reversal where they changed their mind, but I have to start from the risks that are presented to the committee. We have to assume the possibility or even the likelihood that the Third Circuit will adhere to its ruling in Cybergenics. Second, that there's a significant risk that it will decide that since we knew well about it before we started this trial, it applies to this trial; and, third --

THE COURT: Does it apply if the mandate hasn't issued?

MR. INSELBUCH: I think the thinking of the Third Circuit was apparent to us. I don't know that there's a lot of case law that will tell me whether it applies prospectively or retrospectively and whether or not it turns on whether the mandate is issued. I don't know the answers to that.

I want to address all this from the standpoint of the risks that we perceive from our client's constituency point of view. I have to accept the risk that I will ultimately be told by the Third Circuit that we flunked Cybergenics and it's a do-over.

Third, although I see and I agree with the U.S.

Trustee that there's a significant argument about waiver, I see also what the Third Circuit said about waiver and it turns full circle on me here, because the Third Circuit said if you were really worried about this, you should have moved for the appointment of a trustee and since you didn't do that, you've waived that fix retroactively after the fact.

So, the position that I see the committees in is we have to look down the road to the risk that we would lose this case, we would win the case on the merits but lose the case on appeal for one reason under Cybergenics, and by the time that happens, it would be too late to fix it, so, we need to fix it now.

THE COURT: Too late to fix it? Why?

MR. INSELBUCH: Because we will have either gone past the point in time where a trustee can be appointed and the two years will have run sometime I believe in April --

THE COURT: You don't think that would be equitably tolled?

MR. INSELBUCH: No, sir.

THE COURT: Why?

MR. INSELBUCH: Because the Third Circuit told us -- I believe what the Third Circuit is warning us in Cybergenics is you know what we had to say. In fact, they said to the Cybergenics litigants you knew what we said beforehand and you could have fixed it by moving to appoint

a trustee and you didn't do it.

THE COURT: That's the same argument you're going to make vis-a-vis opposition to Mr. Wasserstein. You're going to say he waived.

MR. INSELBUCH: Yes, indeed. I would like to be in a position to make those arguments, but I can't be assured that I will prevail with them in the Third Circuit. I would like to be in a position to argue why Cybergenics doesn't apply to this case, and I would like to be in a position to argue that Mr. Wasserstein has waived, but I can't assume that I will prevail in those arguments.

THE COURT: Well, I invited you to do that prior to December 2nd.

MR. INSELBUCH: Yes, but the problem with that is that if your Honor rules, if your Honor proceeds on the assumption or not assumption, if your Honor orders that this case goes to trial and, in effect, makes a finding that either Cybergenics doesn't apply or a waiver exists and, thus, this case can proceed to trial in the present posture of the parties, then it is not for me to appeal that.

I need to have the alternative route to appeal because I would want to support your Honor's assertion that there has been a waiver or that Cybergenics did not apply, and what I think our position is --

THE COURT: Well, you would probably cross appeal

in that circumstance.

MR. INSELBUCH: But there's no requirement that Mr. Wasserstein appeal. Even if your Honor were to certify the case under 1292(b), there would still be the need for somebody to take an appeal and Mr. Wasserstein could determine that it's in the interest of his client not to pursue the interlocutory appeal but to wait to see how the trial comes out. Maybe the statute will run. Maybe two years will run. Maybe something else good will happen, and I assume that he would be well-advised and advise his clients to do that as well.

So, the way I see the posture is that if your Honor means it, and I'm all for it that your Honor means it, that we go to trial on December 2nd, although I would ask for maybe another week as a matter of personal problems.

THE COURT: Are you in Russia then?

MR. INSELBUCH: No, I'm not in Russia then but I'm coming back from a prescheduled event with my grandchildren.

THE COURT: You really know how to hurt a judge.

MR. INSELBUCH: But that aside and those procedural issues aside, mechanically aside, we certainly want the case to go forward, but I think the way we would prefer it to go forward if we could have our belts and our suspenders on, is we would like a trustee appointed and the trustee to be the nominal party-in-interest that takes the case forward on

December the 2nd.

THE COURT: And, therefore, if I were just going one step further in this syllogistic atmosphere, if I were to deny the appointment of a trustee --

MR. INSELBUCH: Then we would have something to appeal.

THE COURT: -- then you would have something to appeal.

MR. INSELBUCH: Yes, your Honor.

THE COURT: Got you. Do you think I need a round of briefing on reasons why I should appoint a trustee? Do you think we have enough here today? Mr. Purch indicated all the fact-finding I'd have to do before I recommended the appointment of a trustee.

MR. INSELBUCH: I don't think it's so much briefing. Your Honor has already, in effect, I think, reached the conclusion that this case should go forward because even before Cybergenics, your Honor ordered that, in fact, with the debtor not taking the case forward, the committees do that.

The case, as your Honor is well aware, is very large. The stakes involved are almost as large as the debtor's estate to begin with, if not as large or larger than the debtor's estate, and I don't know what other facts your Honor would need to reach a determination under,

whether it's 1104, that it's in the interest of creditors and even that the refusal of the debtor to bring the action is improper because of the stakes involved and the reasonableness of bringing the case. I don't know whether you need a round of briefing on waiver, but it's seems to me this Court is peculiarly knowledgeable, this is not a clean slate. I would be uninformed by whether Mr. Wasserstein or Mr. Bernick think you need more hearings or more briefings.

But what I would suggest I would see as the procedural posture would be your Honor would make a finding that either the case is not controlled by Cybergenics and if it is, that a waiver has been made so that it can go forward for the 2nd, on December 2nd.

THE COURT: What argument would you urge upon the Court that the case is not controlled by Cybergenics?

MR. INSELBUCH: I don't have one, your Honor.

THE COURT: Thank you.

MR. INSELBUCH: But, your Honor, I frankly have no confidence in -- I have to be candid with the Court -- I have no confidence in the argument that because the mandate hasn't come down or because it may yet be en banc and may be another decision, that the Court should not be informed by the opinion of the Third Circuit. I couldn't look you in the eye and tell you that. I certainly couldn't look the Third Circuit in the eye and tell them that, so, I don't

have any confidence in that.

The waiver argument I think has substantial merit but, as I said --

THE COURT: Or to ask for relief from Cybergenics.

MR. INSELBUCH: Well, but the Court can't ask for that relief and I don't know how we can get to ask for that without something being on appeal in the Third Circuit, and the way --

THE COURT: No, no. It's easy. Deny the trustee and then you get to the Third Circuit.

MR. INSELBUCH: Yes, sir.

THE COURT: And then alternatively, you say, by the way --

MR. INSELBUCH: Yes. And if your Honor were to order the case to go forward, determining it, at least the reason why the case can go forward in light of Cybergenics is that there has been a waiver by the parties, and perhaps Mr. Wasserstein will appeal that, perhaps he will not.

THE COURT: I would take it that there would be no resistance on the part of certainly the committees in expediting an appeal.

MR. INSELBUCH: Oh, no. We would much require that. Otherwise, we would certainly urge that on the Court, because without the ability to resolve this, hopefully even before December 2nd, in the Third Circuit, we would, all of

us and at the estate's expense be devoting a great deal of energy and effort that might be for naught.

THE COURT: I don't want anybody to leave here thinking that I lack a genuine concern that the Third Circuit should speak as to whatever we decide to do here before December 2nd, rather than, you know --

MR. INSELBUCH: Absolutely.

THE COURT: -- saying mush, full speed ahead and we'll all end up --

MR. INSELBUCH: I understood that.

THE COURT: -- we all end up in Gnome with nothing.

MR. INSELBUCH: So, the posture I see is your Honor order what your Honor orders, certification on under 1292(b). Mr. Wasserstein may or may not appeal. We would move for the appointment of a trustee. If your Honor deemed that unnecessary at this time, your Honor would deny that, certify that under 1292(b), and one of the two, if not both of those orders, would be promptly appealed to the Third Circuit.

THE COURT: Okay. Thank you. All right. Mr. Bernick.

MR. FRIEDMAN: May I speak briefly? I apologize.

THE COURT: Sure.

MR. FRIEDMAN: I realize my side has been heard.

THE COURT: I thought you waived.

MR. FRIEDMAN: I deferred.

MR. INSELBUCH: He picks up what we miss.

MR. FRIEDMAN: I deferred. First, I want to say that I do think that there is a good waiver argument that could be made. I don't know that I need to articulate all the points here now. I'm really going to look for the moment at a contrary point, which is this. I think if we are going to go to the Third Circuit and we are going to argue waiver, and maybe we're going to argue that Cybergenics shouldn't apply because it shouldn't be held retroactive to a case on the eve of trial and, you know, it's funny, if I were representing somebody on death row, that would be a winner. Guy's ready to go to the electric chair, the new law doesn't apply to him, and I've had that experience.

But putting that aside, when Mr. Bernick moved to intervene in this case, we opposed that and we consistently opposed it and we consistently took the position in opposing it that it would be a breach of fiduciary duty for the debtor to be on the defendant's side of the table, and so, we think we have not waived in argument that even if we go forward on December 2nd, and even if we go forward as this case is essentially already structured, we think we are going to be in a better position before the Circuit if the Court's order reflects that the debtor is now going to be

benched on the sidelines. Assuming that your Honor is not happy with the debtor on the plaintiff's side of the table, I don't think even still that the debtor should be continuing on as defense counsel.

THE COURT: It is not appropriate. Defense counsel for whom?

MR. FRIEDMAN: On the defendant, for Grace.

THE COURT: Okay. Fine. Knock him out as Grace counsel. Why can't Sealed Air hire him as co-counsel?

MR. FRIEDMAN: Because it's a conflict of interest. I mean, Grace, under the Cybergenics opinion, part of the point of it is what we've been saying all along and what I've said many times at this hearing, who benefits economically if we prevail at trial? Grace. Grace logically ought to be Sealed Air's adversary.

There's no circumstance under which it makes sense for Kirkland & Ellis to be representing the enemy or what should be enemy for purposes of this trial.

Now, if your Honor doesn't agree with that, I suppose that is something that your Honor could deny, and it might be something alternative that people could think about to denying a request for a trustee.

THE COURT: Why does it improve your position vis-a-vis the issues that would be before the Third Circuit to disassemble Kirkland & Ellis from this case?

MR. FRIEDMAN: Because in the first instance, the Cybergenics opinion teaches us that the debtor-in-possession or a trustee ought to be on the plaintiff's side of the table. Okay. We're not doing that. We're going to go a little bit outside the box and try and argue that we ought to be able to proceed without the debtor at the plaintiff's table. That's going to be hard enough. But to try and sell the notion that the debtor ought to be on the defendant's side of the table, I think, is one step beyond what may be palatable, and I think we are -- it's not a perfect solution. A perfect solution is debtor --

THE COURT: Why can't I -- you know, let's say, you take an expedited appeal and the Circuit indicates that, fine, the case can proceed for whatever reason, and make an application to terminate Kirkland & Ellis?

MR. FRIEDMAN: Where? In the Third Circuit or before your Honor?

THE COURT: Here, before the Court.

MR. FRIEDMAN: Well, I would think we're certainly making that application now.

THE COURT: Okay.

MR. FRIEDMAN: And if it's denied, I suppose we would have to appeal it.

THE COURT: Okay. I understand.

MR. FRIEDMAN: Thank you. By the way, I have a

copy, I can serve it on others but I happen to have an extra copy of the en banc petition.

THE COURT: I have a copy. Thank you. Mr. Bernick, you know, you sit there so quietly and everybody wants to beat up on you.

MR. BERNICK: Well, you know, I tell you I'm very accustomed to this, especially down in courtrooms in the southern parts of the United States where there are all kinds of implications of finger pointing, but at one point in time I know I've got to get up and I get my chance, so, I'm a patient guy but I practice --

THE COURT: So, I guess David Bernick, this is your life.

MR. BERNICK: This is not the first time that such marvelous things have been said. I won't get into it further but I guess in a way it's interesting that there's so much attention being focused on our role.

THE COURT: Isn't it great to cast a long shadow?

MR. BERNICK: Yes. In my particular case, I've always found that could be rewarding. Look for your opportunity.

THE COURT: My remark was not lost on you.

MR. BERNICK: I have some what I hope will be productive comments to make and then I'd like to go to the chess exercise that I think that your Honor has initiated

among counsel in the courtroom about, well, what if we do it this way and what if we do it that way, but I think that there are some concrete things that I'd like to share with the Court, and let me begin with the construct that appears in the proposed case management order.

The dec action, I don't know if this is something that your Honor has decided since that time that we're not going to be involved with but I think there are --

THE COURT: I'm concerned whether it works.

MR. BERNICK: I understand that. And I took it that was one of the reasons why you put it out there for some discussion. As you know, we did something like that in the Babcock case, and in point of fact, it served a very useful purpose which was that it created -- it told a story to the bankruptcy court about the urgency of the proceeding with that particular litigation, the importance of structuring it so that it focused on the solvency issue and the importance of having it remain in the bankruptcy court and all those objectives were actually successfully achieved.

The one problem that Judge Brown had, and Elihu was very proud of pointing out, where he said, look, how can this be merged in the process, Babcock and Wilcox, is the plaintiffs saying there's no cause of action against the other corporate defendants who will madly agree, then of

course there's no course of action. Where is the actual diversity of interest? Where is the actual adversity of a case in controversy? And that was a fair point.

Our anticipation when we filed the suit in that fashion was, in fact, the committees would intervene, we specifically said this, so they'll be able to come in and to pursue the theories that they believe are the best theories to pursue in the case.

With the benefit of hindsight, you might think about making some modifications to the process here. First, in this particular case, we do have a defendant that's not part of any Grace entity, so, we could file the dec action against Sealed Air, a real defendant. If we're wrong in the claims that are being made, the allegations that are making the declaratory judgment action, they would be bound by the absolute or opposite result.

THE COURT: What would you allege against Sealed Air?

MR. BERNICK: I think we would probably, and I think this is something we'll get into, the question that your Honor posed, which is what -- well, what if Grace authorized the prosecution of the case, let me put that off for a moment and assume all we're talking about is the dec action that you described in the CMO.

We sued Sealed Air. They, of course, would madly

agree with everything that we are saying, but we'd also sue claimants, and this is somewhat similar to what's going on in the ZAI litigation right now. Remember, that's the litigation that's concerned with whether, is there really a scientific problem with this attic insulation and there, in order that the science issue be precipitated and addressed, the Court has adopted a procedure whereby we brought into the case claimants for purposes of creating an adverse party to then litigate this issue, so, it's Grace versus the claimants on the science, and the costs of representing those claimants are going to be borne by the estate. There's money set aside.

What's the concept is you get claimants in there who are actually adverse to the debtor asserting a position and the case gets litigated, so, in this particular case we would make these claims.

THE COURT: How many claimants? Nominal claimants?

MR. BERNICK: No. These are actual under 3004, another bankruptcy rule, you can bring in -- the debtor can bring claimants into this case and they are already present in this case. I believe there are about 10 ZAI claimants who are in the bankruptcy proceeding for that purpose. We could name them and we could name other claimants John Does, however you want to characterize them. They also would be adverse parties.

At that point the committees could intervene for purposes of defending against the declaratory judgment allegations on behalf of those claimants and also on behalf of all creditors, so, they have a real role to play. The committees are not being sued. They're not initiating suit. The suit has already been initiated. All the parties are there. There's actual adversity between the parties. Depending upon how your Honor allocates the burden of proof and whatever, we can actually go forward and litigate the issue. How would that stand up?

Number one, we, that is, Grace, would be agreeable to the prosecution of that case, with only one proviso. The lesson of the intervention process is fresh in our minds. We are not interested in pursuing it if the pursuit of that claim, in fact, would be given collateral effect in the Chapter 11 case.

We have no problem with its being pursued for purposes of prosecuting the claim against Sealed Air, we will not stand in the way, we'll cooperate in the effort, but it shouldn't be binding. We should not be bound with respect to the Chapter 11 case for the whole litany of reasons that we've set out in our papers.

THE COURT: Are you only concerned about the Chapter 11 case or are you concerned about other jurisdictions?

MR. BERNICK: I'm not sure what other jurisdictions. The Missoula, Montana cost recovery case?

THE COURT: Wherever.

MR. BERNICK: I'm mostly focused on the Chapter 11 case. I'd have to think if there's something else, but that was the dominant concern that we had, that this not be used to gain an advantage in the Chapter 11 case. So, Grace would be agreeable to entry of the CMO along those lines.

Number three --

THE COURT: And by the way, when you say not used in the Chapter 11 case, you mean as a definitive proven fact, not that the Court couldn't consider the same evidence in arriving --

MR. BERNICK: Evidence, whether the evidence comes in or not would be determined with a clean slate on the basis of --

THE COURT: May very well be the same evidence.

MR. BERNICK: A lot of the evidence may well be the same.

THE COURT: Okay.

MR. BERNICK: Also, we wouldn't want to have the argument made that the fact of our making these claims or, for that matter, making statements somehow is a judicial admission; that is, there really is a clean slate in the Chapter 11 case.

Number three, would this solve the Cybergenics problem, and I think it probably would. In fact, I think I failed to see the problem under Cybergenics for the following reason:

It is quite clear under Cybergenics that the debtor has the power to pursue these claims. Debtor has the authority. We're exercising the power. We are initiating the litigation.

THE COURT: How are you going to exercise the power?

MR. BERNICK: By bringing the dec action.

THE COURT: You bring the dec action, you sue Sealed Air, and what does it say vis-a-vis you and Sealed Air?

MR. BERNICK: Under what I'm talking about now, this dec action would be the same dec action set out in the CMO to say this is not a fraudulent conveyance transaction.

THE COURT: And by the way, where do you find that in the bankruptcy code that you can bring --

MR. BERNICK: Well, the bankruptcy code on the adversary side, the adversary side of the bankruptcy code adopts basically --

THE COURT: It says you can bring an action to set aside a fraudulent conveyance. I didn't find anywhere in the code where it says you can bring an action to say it's

not a fraudulent conveyance.

MR. BERNICK: Well, no. I think if it's an adversary proceeding, what we're really saying is we can initiate the adversary proceeding as a dec action because the dec action rules would be available in the adversary proceeding. The substantive right to prosecute the claim or power to prosecute the claim --

THE COURT: Where is the case in controversy with Sealed Air?

MR. BERNICK: The case in controversy with Sealed Air is supplied by the presence of those claimants. They have a real controversy with Sealed Air.

THE COURT: So, you have to bring the claimants in.

MR. BERNICK: They said what I said under this scenario, you bring in both Sealed Air and the claimants.

THE COURT: And I take it the claimants would counterclaim against Sealed Air.

MR. BERNICK: No. The claimants, the claimants are adverse to Sealed Air. They are the beneficiaries of the recovery, if there's a recovery. The claimants are there, they will be there. They will be represented by the committees who would intervene, and the committees would assert all of the same claims, all of the same claims they're pursuing now by way of the same theories they're pursuing now.

THE COURT: What holds Sealed Air in? You file this action and the following week Mr. Wasserstein, on behalf of Sealed Air, files a motion to dismiss, and nobody said who's going to hold him in --

MR. BERNICK: By that time --

THE COURT: -- unless the claimants file a counterclaim against Sealed Air.

MR. BERNICK: -- the claimants would file their -- either could file their own claim or the committee as an intervenor would file a pleading that would make that same claim.

THE COURT: What kind of pleading?

MR. BERNICK: It's the same pleading that we were required to file when we got into the case.

THE COURT: They have no capacity to sue so they can't make a claim over as against Sealed Air.

MR. BERNICK: They are not the ones who are -- they are not exercising their power to initiate the litigation. They're exercising their power which the Cybergenics court recognized to be intervenors and to play a role as completely commensurate with their being intervenors and as intervenors they are required, as your Honor indicated, to align themselves with a side and --

THE COURT: Well, I can align parties but I got nothing to hold Mr. Wasserstein in at that point, and he

agrees with me.

MR. BERNICK: Well, I'm not sure. He's held in on our dec action.

THE COURT: He's not held in on your dec action.

MR. BERNICK: Why not?

THE COURT: Because you're in agreement, you're in agreement it was not a fraudulent conveyance and he says goody, goody, it was not a fraudulent conveyance. Judge, what am I doing here?

MR. BERNICK: But if there's a case in controversy, he's still a party.

THE COURT: Where is the case in controversy?

MR. BERNICK: The case is controversy is actually supplied in a number of different ways. It's supplied by our reciting, as we did in Babcock, that this is an issue that must be resolved as having an impact on the Chapter 11 case. If you can satisfy a case in controversy without having a traditional plaintiff versus defendant situation, that's what declaratory judgment actions are all about.

THE COURT: Let's say we try this case and it goes up on appeal. How do you think the Third Circuit would look at this case? Would they say it's odoriferous?

MR. BERNICK: I think that, in point of fact, the Third Circuit in looking at this would say that this is actually a reasonable way of solving what is a difficult

problem in our case. The difficult problem in our case is, I intended to get to this in a little bit but it is appropriate now, your Honor referred to conflict of interest. They like to talk about conflict of interest. This is not a conflict of interest. This is not a situation where Grace doesn't want to sue somebody of its own who's on the other side of the "V".

The people on the other side of the "V" are Sealed Air. There's no issue or reluctance to sue Sealed Air because in some fashion we do business with Sealed Air.

The reason that there's a conflict is that there's a conflict between competing strategies for how to pursue the Chapter 11 case. Grace made a judgment. Grace's judgment as the primary issue in the Chapter 11 case is defining its tort liability. That's the dog. That's not the tail. That's the primary concern in the case.

Grace further determined that if this case were initiated, it would not have a lot of merit and it threatened to create an advantage or compromise the process in the Chapter 11 case. That's why we didn't pursue it.

Now, those are both judgments. They're judgments that recognize what the Grace case is all about, which is defining tort liability.

Now, others may make that judgment differently from us, but there's no conflict of interest to making that

judgment. It's our assessment that the key issue is the tort liability. It can only be determined properly in the Chapter 11 case. The fraudulent conveyance claim threatens to compromise the integrity of that proceeding. That's how they want to use the fraudulent conveyance litigation. That's what gives rise to the problem, and under those circumstances, this fix, that is, that we initiate a declaratory judgment action so that the issue of was there a fraudulent conveyance does get precipitated with our power and authority, we have the power and authority to do this and we're exercising it is a perfectly reasonable solution.

THE COURT: If there were no Cybergenics, we would not be resorting to consideration of that stratagem. We would now be in the second week of trial with you aligned with the defendant.

MR. BERNICK: That's correct. That's correct. This is a way of being able to pursue exactly the same scenario but in compliance with Cybergenics, and what's the key differentiating factor with Cybergenics is the debtor agrees to the prosecution of the litigation. The debtor agrees we are initiating this process. That is the big difference with Cybergenics. And the twist of doing it as a dec action is only there because of the particular nature of our case, whereas this tension between the Chapter 11 strategy and what we do in connection with the fraudulent

conveyance case, that is the only thing that requires that you have a dec action, and that really highlights a very important feature.

THE COURT: By the way, why do you even have to, in your dec action, sue Sealed Air? Why don't you just sue the claimants and let the claimants worry about Sealed Air and getting them in?

MR. BERNICK: But that really is the essence of what is going to carry all my remarks here.

THE COURT: Why bother to sue Sealed Air? Why not sue the claimants?

MR. BERNICK: Because Sealed Air ultimately has got to be bound in the --

THE COURT: Well, the claimants are going to bring Sealed Air in.

MR. BERNICK: Well, I don't know that the claimants themselves can bring Sealed Air in because at that point, how do the claimants get into the case?

THE COURT: You sued them.

MR. BERNICK: We sued the claimants. They then --

THE COURT: You said to the claimants, by the way, there's an allegation that we engaged in a fraudulent conveyance. You're the claimants out there. You're the people that are going to benefit. You're the people who allege you were deprived of the benefits of what should have

been the estate as a result of this fraudulent conveyance and, so, therefore, there's a case in controversy between you and the claimants.

The claimants say, well, you know, it's not a full test unless we get Sealed Air in there, so, they either bring a third party action and they bring in Sealed Air, claimants become a third party plaintiff. You know, your suing Sealed Air doesn't do anything.

MR. BERNICK: What it does, your Honor, is that it is the debtor exercising the very power that the Cybergenics -- what the Cybergenics court recognized was critical, which is that we are initiating the litigation, and that carries through all of what we're proposing to the Court today, is that in contrast to the Cybergenics case, the debtor is prepared to have this litigation initiated.

Our concern is not with the prosecution of the case. We're prepared to authorize the prosecution of the case. We have always been prepared to have this case proceed, and I want to get back to the waiver point towards the end of my remarks.

The issue is not whether the case proceeds. The issue is whether an advantage is gained from it for purposes of a Chapter 11 case, so, whatever power the debtor has here under the code under Cybergenics, we're prepared to see deployed towards the initiation of this litigation, and that

brings me to the second and third options here, which are the examiner and the limited trustee.

With the examiner, there obviously is clear precedent for appointment of an examiner. In particular, to deal with this type of claim, PWS Holding case and also Kean case, in both cases the examiner was appointed. It's consistent with the code, Section 1106(b), that sets out specifically that an examiner can be appointed and can assume other duties of the trustee.

Is there a Cybergenics problem if an examiner is appointed for that purpose? I don't know what it would be. Cybergenics says read the code. If you comply with the code, you're okay.

In this particular case, the code is quite clear, and it's been read in exactly that same fashion.

THE COURT: Cybergenics didn't provide for an examiner or a limited trustee.

MR. BERNICK: It didn't have to. The matters were not before it, as your Honor pointed out earlier on this afternoon. All Cybergenics said is read the code. The power has to be granted. It has to be granted. The way it was granted was to a trustee and to the debtor, debtor-in-possession.

What's an examiner? An examiner is given under the code 1106(b) the authority of the trustee or the authority

of the debtor-in-possession. So, the matter wasn't before the Court in the Third Circuit. It's totally called for under the code. There's not a single case that says that you can't do it, and it would be particularly clear that there was compliance with Cybergenics if we were to agree, the debtor were to agree to the appointment of an examiner. And that's my second comment and perhaps contribution.

THE COURT: If an examiner were appointed, would the examiner have to hire counsel?

MR. BERNICK: I don't think that the examiner would have to hire counsel. I think that the examiner probably could use -- well, what the examiner ought to do is the examiner ought, first of all, to conduct an investigation to see whether the claims --

THE COURT: That's what examiners do.

MR. BERNICK: Right.

THE COURT: How long is that examination going to take?

MR. BERNICK: I wouldn't think that examination would take overly long here. I mean, let me get to the bottom line. I believe that if you had an examiner here in a very short period of time --

THE COURT: Quantify short. I don't understand.

MR. BERNICK: Well, I don't know. Two weeks.

THE COURT: Two weeks?

MR. BERNICK: Sure. All the information is available.

THE COURT: Okay. And the examiner then says, hum, I think that this should proceed. What happens next?

MR. BERNICK: I know that if the examiner were to decide the case could proceed, under those circumstances I don't know why they couldn't use the Milberg firm.

THE COURT: So, the examiner would then have to hire the Milberg firm?

MR. BERNICK: Could hire the Milberg firm, presumably would.

THE COURT: Maybe the committees would object to that.

MR. BERNICK: Maybe they would. I doubt that they would. I suspect that they would want to intervene in the process as they already have and help out with the prosecution of the claim. The Milberg firm could not serve as counsel to --

THE COURT: To the committees.

MR. BERNICK: -- as counsel to the examiner if they represent any adverse interest, I think is how the rule reads.

THE COURT: So, what are you suggesting, appoint an examiner as a lawyer who will appear pro se?

MR. BERNICK: Or you appoint a lawyer who's an

examiner and probably in the first instance acts to talk with the Milberg firm and find out what facts have been developed.

THE COURT: What if I thought it was better for the case and, by the way, it's not my appointment, it's I believe the U.S. Trustee's appointment, maybe I have a veto, I'm not quite sure, and they decided that some Wall Street person should be the examiner? As a matter of business, the Wall Street person is then going to have to hire an attorney, who then is going to have to come up to speed. Now we have two more people.

MR. BERNICK: All depends. I suppose you're correct, there's a way in which you can foresee that the implementation would be cumbersome, would take too much time. I don't know that that's a given. I think while all this has to be recommended by the U.S. Trustee's office --

THE COURT: Potentially it could cost the debtor's estate an additional 20 million dollars.

MR. BERNICK: Well, I think that really depends upon how this role is defined. I think that your Honor has the ability to define exactly what that role is. It may be that the appointment itself has got to be on recommendation from the U.S. Trustee but defining what the role is is up to the Court.

THE COURT: I understand that, but I don't believe

I have the appointment. I say appoint an examiner but they choose the examiner.

MR. BERNICK: I think they make -- Mr. Purch, I'm sure, will correct me if I'm wrong -- I think they make a recommendation with regard to the appointment.

THE COURT: I understand I have a veto.

MR. BERNICK: Yes. But under this scenario, compliance with Cybergenics would be quite clear, particularly if we were initiating this process. We're using our power as the debtor-in-possession, which is recognized in the case, we're saying let's have an examiner do it, which we're also entitled to do and the code provides for and the case could go forward.

What's more, we are agreeable to this with the one proviso, which is that not have the collateral impact on the Chapter 11 case. If the case were to proceed on that basis to get to all these claims and issues about the role that our firm would play and the role that Grace would play in the process, I don't know that it's important to have Grace play a part in the process. I don't know if it's important to have our firm play a part in our process.

At that point you've got an examiner. Time has now passed so presumably the trial can still go forward with Sealed Air. We're open to other ideas to facilitate it but I don't view it as critical that we participate in the

process.

Indeed, the whole purpose in the way is to get the examiner to prosecute the claim on behalf of the estate, so, we would agree the examiner prosecute the claim on behalf of the estate.

Same kind of remarks with respect to the limited trustee. The limited trustee, the only thing I heard that I've heard against the idea of a limited trustee is in argument from the U.S. Trustee that says, gee, somehow that role seems to be inconsistent with other provisions in the code. There's no case that says that and there are a number of cases that do recognize the possibility of having a limited trustee.

THE COURT: Only for purpose of litigation.

MR. BERNICK: Only for purposes of litigating this claim.

THE COURT: This claim.

MR. BERNICK: This claim.

THE COURT: And let's assume management of W. R. Grace is unhappy with the way that the limited trustee is pursuing the claim or taking certain actions, how do I resolve the conflict that may arise between management and the limited trustee?

MR. BERNICK: I think that, again, this all comes down to how that role is defined to begin with, depending

upon how it's defined.

THE COURT: By the way, do I have to bond that limited trustee?

MR. BERNICK: I don't know the answer to that question but the question that your Honor has raised about the way in which those powers are exercised I think really comes back to a question of how the power is defined to begin with.

We are agreeable to the point of a limited trustee, subject to some of the provisos that I talked about. You have to work out what the scope is, that is, the prosecution of the claims against Sealed Air. You'd have to work out the impact on the Chapter 11 case, which I think is fairly straightforward. And you also have to address the question of privileges, which I think largely has already been done by Judge Dreier.

Judge Dreier already did some pretty good line drawing on what work product and what attorney-client communications would be within the scope of the fraudulent conveyance action, and I think that that probably has done most of the work or maybe a couple other refinements, but probably has done most of the work.

THE COURT: Well, if you were to withdraw from the case voluntarily, then I take it there are no privilege problems remaining.

MR. BERNICK: No, that's not quite right. If we were to withdraw from the fraudulent conveyance case, we would want to make sure that the privileges that the client has with respect to matters that pertain to the Chapter 11 case are preserved, and that's exactly where Judge Dreier did some line drawing, saying this comes in on fraudulent conveyance, this does not.

THE COURT: By the way, I just raised this now. I haven't given any thought to it. Could you withdraw, Kirkland & Ellis withdraw from the fraudulent conveyance case and still remain as Chapter 11 counsel?

MR. BERNICK: I don't see what the impediment would be.

THE COURT: I'm asking. I don't know the answer.

MR. BERNICK: No. I mean there are adversary proceedings in which there are limitations on what Chapter 11 counsel can do. We've had them in other cases. We have this issue in the Babcock case, because there was a potential claim against another client of mine, a tobacco company, and the issue was raised because the estate had a potential claim against a tobacco company, and we defended that tobacco company in another litigation. Was there a problem, and the way we handled that from the very outset of the case in our application was to carve out that role, that is, the pursuit of that claim, and give it to other counsel

while there was a challenge.

THE COURT: If you withdraw from the Chapter 11 and the case proceeded without you and Grace remained passive --

MR. BERNICK: You mean withdraw from the Chapter 11 or fraudulent --

THE COURT: From the fraudulent conveyance, and Grace taking a passive position, wouldn't your fears of collateral estoppel or however you want to phrase them in the Chapter 11 case be mitigated, ameliorated, eliminated?

MR. BERNICK: No. They would potentially be in two ways but subject to two problems. One is that the argument will be made that it is to their advantage to try to use the fraudulent conveyance case to affect the litigation in Chapter 11, so, what they will say is, well, that's great. Grace has now agreed that there can be another representative, a limited trustee or an examiner. That other representative now takes on the role of Grace.

THE COURT: No, no. You're not following me.

MR. BERNICK: I'm sorry.

THE COURT: Forget what they say at this point. If you were to determine that, you know, maybe it's better that Kirkland & Ellis not bring this action, debtor-in-possession not bring the action, Kirkland & Ellis remove itself from the fraudulent conveyance case. The case will proceed. Assume that the Circuit finds either a waiver against Mr.

Wasserstein, potentially against Grace, the case proceeds, Grace does nothing. You go back to Chicago. Mr. Wasserstein carries his own water, what concerns will you then have in the Chapter 11? You're not here.

MR. BERNICK: I don't think that we would.

THE COURT: Maybe that's a solution.

MR. BERNICK: Maybe that's a solution. That's, in essence --

THE COURT: I mean, I'm not pushing you out of the case and I'm not telling you how you should comport yourself, but that's a solution.

MR. BERNICK: I only had a couple other remarks, and I know I've been up here for a while, so, I'll sit down very promptly.

On a plenary trustee, I don't know that the merits of this idea are really even actually before the Court.

THE COURT: I have concern about it. I'll just say that.

MR. BERNICK: Okay. If it is, we are prepared to submit a brief to the Court, and we corresponded with the Court about that last week. I know some others did make written submissions. I'm assuming that's just because they went ahead and made them; but if the Court wants to, we would like to have the opportunity to submit a brief to the Court on these matters and are prepared to do so today.

THE COURT: Everything is before the Court. Every issue is before the Court. The Court will then distill what it's going to do and if you want to file a brief promptly, go ahead.

MR. BERNICK: Okay. The last remark that I'll make has to do with this timing, chess game that your Honor has kind of set up a little bit. As I hear it, I mean, it all sounds very, very complicated, possible permutation and maybe also that there are things I just don't know that your Honor knows about how the Third Circuit will proceed from the timing point of view, but it does seem to me kind of a stretch to operate on the presumption that if an appeal is taken from some order of this Court, that there can be an appeal that is expedited so fast that we really do have some level of certainty by December 2nd.

THE COURT: Why not? They did the Torricelli matter in two weeks.

MR. BERNICK: I don't know about the Torricelli matter. That's why maybe the observation, maybe your Honor knows things that I don't.

THE COURT: And potentially that was only a 15 million dollar case.

MR. BERNICK: Okay. There was also a matter of --

THE COURT: And by the way, the Supreme Court denied cert in what, three days? Okay.

MR. BERNICK: As I said, maybe --

THE COURT: Supreme Court of New Jersey acted in a day and a half.

MR. BERNICK: Less surprising to me.

THE COURT: And by the way, if the Third Circuit believes that I set an inopportune trial date, they'll tell me. They can issue a stay.

MR. BERNICK: What I was going to get to is that whatever goes up to the Third Circuit ought to go up in a meaningful fashion and some of the observations that are made, if all we're doing is to move to appoint a trustee so it can then be denied so we can then take an appeal and that can be up on appeal, it seems to me what I would respectfully submit to the Court is that the Court -- there's obviously a waiver argument. I'm not going to comment on the strengths of that argument unless your Honor wants me to, but apart from the waiver argument, there's a complicated question of how to deal with Cybergenics, assuming that Cybergenics holds that it's there, it's not turned around in a regular en banc, how do you deal with it, and that we ought to craft the best way for this case to deal with Cybergenics.

THE COURT: Could we deal with Cybergenics by consent of all parties saying that for purposes of this case, Cybergenics does not apply? Everybody consent?

MR. BERNICK: I think if you proceeded by consent, at least language in Cybergenics --

THE COURT: Do I have your consent?

MR. BERNICK: You have my consent on no less than three different possible options.

THE COURT: How about what I just proffered?

MR. BERNICK: Just it has absolutely no effect and we go forward and try the case?

THE COURT: No. We still give you to December 2nd.

MR. BERNICK: Okay. Well --

THE COURT: Or the 9th, whatever.

MR. BERNICK: I would also agree to that, but I kind of like the last twist best, which is that on December 2nd, you all can go forward and we'll go work on other things.

THE COURT: And let you out.

MR. BERNICK: Just cut us out.

THE COURT: And you're not going to go over to the Sealed Air side?

MR. BERNICK: I wouldn't go over to the Sealed Air side.

THE COURT: Well, they think you're there now. But we have this famous surgéon out in Los Angeles who can separate you from the hip. Right?

MR. BERNICK: I'm not sure that the joinder is

quite that difficult.

MR. INSELBUCH: We consent.

THE COURT: We haven't heard from Mr. Wasserstein yet. Mr. Wasserstein, always a pleasure. I may not like what you say but I'll defend to the death to permit you to say it.

MR. WASSERSTEIN: Thank you, your Honor. First, if it please the Court, I'd like to discuss the waiver issue, and we called your Honor and asked about submitting a brief and we were told not to do so and so we didn't. If your Honor thinks it appropriate, we would like to submit a brief with regard to the waiver issue by the end of the day tomorrow.

THE COURT: Yes. I do want that, and the reason that I said don't submit something, I really wanted to hold this discussion. You know, I don't look at this as an argument here today. We're having a discussion and we're talking about a lot of different permutations to solve a very difficult problem, and if and when this matter goes to the Third Circuit on an expedited basis, I believe it's instructive for them to read a transcript such as this to understand the real-world problems that arise from matters of statutory constructs.

MR. WASSERSTEIN: Understood, your Honor. With regard to waiver, I will be very brief with regard to it

right now.

THE COURT: The bankruptcy side of Skadden doesn't talk to the litigation side?

MR. WASSERSTEIN: We talk. And, in fact, your Honor, the way the issue came up in Cybergenics was not through an argument that there was lack of capacity to sue. The argument came up in Cybergenics as a standing argument.

The Court stated at page five of the opinion, and this is after the case had gone back, they also argued for the first time that under a plain reading of Section 544(b), and the reasoning of Hartford Underwriters, the committee lacked standing to bring the fraudulent transfer action because only a trustee or debtor-in-possession has such standing.

That is exactly what we did in this case, and we did it in the 12th affirmative defense of our answer. So, we did exactly what the defendants in Cybergenics did, and the Court went on to say a bunch of things about that issue, such as the Court recognized that many courts had approved of the kind of derivative standing arrangement deployed in this case, Cybergenics and elsewhere, noting, and I'm quoting from page 15 to 16, "We are well aware that most courts to consider a creditor or creditors' committee's power to act derivatively under the avoidance provisions in the wake of Hartford Underwriters have reaffirmed so-called

'derivative standing' and" --

THE COURT: Are we out of Cybergenics because the committees who have brought this action did not do it derivatively?

MR. WASSERSTEIN: No. I think they did bring it derivatively in this case as well. If you read the complaint in this action, it was done derivatively because the first thing I did when I read Cybergenics was to go back and read the complaint in this case as well, so, we are exactly where the Cybergenics defendants were when they were up on appeal to the Third Circuit. We're at exactly the same position, and the Supreme Court has held in Curtis Publishing against Butts that the mere failure to interpose a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground, and that's at 388 U.S. at 143.

So, I say in the first instance that we did exactly what we were supposed to do, and if your Honor will recall, your Honor requested that no dispositive motions be made in the case management order in this case. So that we raised it in our answers and we did exactly what the Cybergenics defendants did, and I think that ought to take care of the issue of standing, but we will address it further tomorrow.

With regard to Mr. Bernick's -- let me just back up for a second. I believe you may find this hard to believe

but I agree with Mr. Baena with regard to his statement that Cybergenics really prevents any consideration of the proposal that your Honor made in the proposed case management order.

THE COURT: The dec action.

MR. WASSERSTEIN: In the dec action.

THE COURT: Because there's no case or controversy.

MR. WASSERSTEIN: That is the reason for it.

THE COURT: And that's why I premised my remarks earlier by saying I wanted a dialogue today. If I didn't put something out, I don't know what I would have received in return.

MR. WASSERSTEIN: I think it's a problem on two levels but I think that the problem doesn't get cured by Mr. Bernick's proposed solution to it, either.

I think it's a problem on the first level of Grace suing the committees. In the first instance, I would suggest that under Cybergenics, there's an issue as to the committees' right to sue or be sued under Section 1103(c), where the Court specifically states that trustees have the capacity to sue or be sued but there is no corresponding capacity with regard to committees. So, there's that issue to begin with.

But aside from that, Grace does not have an actual controversy with the committees vis-a-vis the fraudulent

transfer. If Grace has a controversy at all, it would be with Sealed Air. Similarly, the committees have no controversy with Sealed Air because Cybergenics says they don't, that they can't bring it, so that there's no controversy at the first level. There's no controversy at the second level. Much with Mr. Bernick's proposal, I submit to your Honor that there's still no controversy. Again, there's no controversy between Sealed Air and Grace because they say the same thing. There's no controversy with individual creditors because an individual creditor can't sue Grace with regard to a fraudulent transfer, nor can Grace sue the individual creditors with regard to the same thing. And I would point out to your Honor that the Third Circuit has required in declaratory judgment action that there be an actual adversity of interest, actual adversity, and that's Step Saver Data Systems against Wyse Technology, 912 F. 2d 643, and that's a 1990 case in the Third Circuit.

So, where I come out at this point, your Honor, is reluctantly I'm about to make a proposal that nobody has made before.

THE COURT: You're going to consent.

MR. WASSERSTEIN: No, sir. I'm not consenting.

THE COURT: Gee, you know, Mr. Wasserstein, what a surprise.

MR. WASSERSTEIN: What a surprise. I'm full of surprises.

THE COURT: I'm just overwhelmed as I sit out here.

MR. WASSERSTEIN: Let me suggest a way. The problem that we have here, your Honor framed the issue right at the beginning, finality at one point, and that is really my chief concern.

The other way to go under Cybergenics is the appointment of a trustee, and I think that everybody here, I would have said everybody here based upon the submissions but I'm not so sure that that's the case anymore. The concern that I have is that finality through use of 1292(b) is not necessarily finality, and the reason for it is that even if your Honor were to certify a question for appeal, the Third Circuit doesn't have to take it.

There is only one way in my view to get finality, and let me throw this out as a possible idea. We move to dismiss on the grounds of Cybergenics. There are cross motions that are made that Cybergenics should not apply because, fill in the blanks. There are arguments that could be made that in lieu of dismissal, there ought to be a limited trustee appointed, as Mr. Bernick has argued, or that there ought to be an examiner appointed or that Sealed Air has waived all of these things would come up. Your Honor reluctantly grants the motion to dismiss. Poof, we're

in the Third Circuit with regard to all of these issues and anything else that anyone would throw in, and the Third Circuit can do two things.

The Third Circuit can affirm, in which case you're back to the problem that you had before trustee versus waiting for reorganization for the possibility of bringing the claim, but if the Third Circuit reverses and says it is appropriate for there to be an examiner or it is appropriate, there is provision or room within Cybergenics for a trustee, a limited trustee, we've solved my problem, and we haven't solved it today but we've solved it a lot sooner than we would to get through a reorganization.

THE COURT: Well, I can get the issue up there without dismissing you.

MR. WASSERSTEIN: Fine. Your Honor, if we can do that, I'm perfectly happy to do it that way as well. Again, my sole issue is to finality. That's all I'm concerned about, and if we can do it quicker, that's good for my client as well.

THE COURT: Let me ask you another question that I haven't asked others, because you'd be a critical player in a court-ordered mediation. What would your position be on that?

MR. WASSERSTEIN: I rather not discuss it on the record, your Honor, if you don't mind. I would discuss it

at side bar. There are people in this room who are foreign to this and I just don't think it's appropriate to do it that way.

THE COURT: Well, the only reason I bring it up, if you look in B & A today, you'll see under the inherent power of the court, they have a right to order mediation.

MR. WASSERSTEIN: Obviously, if the Court did something within its power, we would consent to it, of course.

THE COURT: Okay. I understand. Anybody else want to be heard? Mr. Kruger, do you want to be heard? I always find you to be a voice of reason, Mr. Kruger, even though you are aligned with the debtors.

MR. KRUGER: I may be last. I don't know about voice of reason. There's no doubt Cybergenics sort of dropped a large bomb into this nice process and I think I agree with Mr. Wasserstein that, obviously, everybody wanted to have finality and at least recognize that if there is to be a trial, that if there is an appeal by the loser, it need not be on the basis of the Cybergenics decision. And, unfortunately, I begin to like every proposal I hear. I like the dismissal. I like Mr. Bernick's proposal of the declaratory judgment.

The real problem seems to me is to get something in front of the Third Circuit that may give us some reliable

guidance as to what the best way is to go forward, and I can think of the order for an examiner, some will appeal from that decision to the Third Circuit and see if that works for them.

We could move to dismiss the Milberg, Weiss firm from this case on the grounds that now Cybergenics has been determined, there's no reason for them to continue to run up fees and do activities on behalf of the plaintiffs because that accomplishes nothing, just as a way of getting the Third Circuit to comment on it.

I don't know what the right answer is but I think that the real answer is to try to find some decision that the Court is comfortable making with respect to the various choices that have been presented.

THE COURT: Sooner rather than later.

MR. KRUGER: Sooner rather than later. I'm not sure that the money that has been spent and the effort to get ready for trial is wasted in a sense because, obviously, there has been discovery. There have been reports by experts. Those are not going to go away and those are still all going to be present forever and, obviously, this is an issue that needs to be determined.

When we talk about a plenary trustee, there I have some issues because I don't know that's a helpful decision to make because it's sort of like using too big a weapon to

try to get to what is only a piece of this puzzle and also not clearly necessary. A trustee standing in the shoes of the debtor may have the same issues that the debtor has with respect to what it does with respect to this prospective litigation, so, it may well be, a better course of conduct may be the examiner with the various parties prepared to submit orders, if you will, or samples of orders to the Court for to you select what the exact role and purpose of the examiner may be, and perhaps using that as a basis to get the Third Circuit to comment on their decision.

In the motion that was made for an en banc hearing, the movants point out that there were at least 260 adversary proceedings now pending in the Third Circuit brought by committees. I'm not sure what the Third Circuit meant to do but, obviously, other circuits and other courts all over this country that bankruptcy proceedings have approved the prospect of committees bringing on those kinds of actions. I'm reluctant to see us do something without the Third Circuit's perimeter ultimately because then I think we may in fact spend millions more dollars and end up with the result that is challenged not necessarily on the merits but because of this very narrow reading of the statute.

THE COURT: I think that is really where we began, that the Court is reticent to go full speed ahead without some direction, but I can't get any direction unless I get

something before them, and one of the ways is to set a trial date. Another is to maybe grant or deny some of the other relief that people seek, and I'm sure with the strength of the law firms involved in this, an expedited appeal is something that should be able to occur.

MR. KRUGER: We would hope so. Thank you.

THE COURT: All right.

MR. BENTLEY: Very briefly, your Honor, Philip Bentley for the Equity Committee. We've heard a lot of proposals today. Almost all of them have been the subject of vigorous controversy. Your Honor has heard that the notion of waiver will be vigorously disputed, so will the notion of proceeding with the declaratory judgment action, same with the limited purpose trustee and the plenary trustee also will be vigorously disputed for practical reasons, not the legal reasons.

THE COURT: So you have the answer?

MR. BENTLEY: Well, your Honor, I'm not saying anything that your Honor hasn't heard. I would just point out that the only proposal that has not been the subject of vigorous dispute here today is the examiner with expanded powers.

Obviously, there's not any guarantee as to any proposal, but the only thing negative that has been said about that as a matter of -- as a legal matter that would

solve the problem facing the Court, the only negative that has been raised has been the U.S. Trustee Office's comment that the Third Circuit has not specifically addressed it, and I think that the fair characterization is the Circuit has not addressed it one way or the other.

THE COURT: Well, you know, maybe my comments were negative that we've got to pay an examiner, an examiner will cause delay, an examiner may have to retain counsel, you may add ten million dollars to the debtor's estate as a result of the appointment of an examiner. I don't see that as positive.

MR. BENTLEY: Understood, your Honor, and I would have thought that perhaps Mr. Bernick's response may have somewhat alleviated the Court's concern in that the debtor is amenable to the examiner looking at this quickly when the thing -- this is something the examiner could look at quickly, possibly without hiring his or her own counsel, but even if they did hire their own counsel, it still could be done quickly and the examiner then could retain the Milberg, Weiss firm. I don't think we've heard anybody disputing that as a possible alternative.

THE COURT: Okay. I understand. I noted Fresenius people are here and do they want to be heard?

MR. ROSENBLOOM: Your Honor, briefly. The hour is late.

THE COURT: No, the hour is not late. We've got all the time to listen to you.

MR. ROSENBLOOM: David Rosenbloom on behalf of the Fresenius Medical Care Holdings. We are the case-in-waiting, your Honor, and I understand that there are certain differences between the proceeding against Fresenius and the proceeding against Sealed Air. Most notably, we are not on the eve of trial and I do not believe there exists as to our case the consensus that Mr. Baena posits regarding the unanimity of it being perceived to be in the estate's interest to go forward as to those claims.

Nonetheless, we share concern of everybody here that downtime is the enemy of the plan, of the parties, and impediment to the Court's work and, so, we have a similar interest in getting our case back on track.

Mr. Wasserstein addressed to you the concerns about a case or controversy in the context of an action seeking money damages. I'd like to suggest to the Court that whatever difficulties there are in finding a case in controversy, if it's money damages you're talking about, do not apply to a declaratory judgment action that seeks to declare certain rights, liabilities, interests and property and otherwise.

THE COURT: Fine. You then make the declaration there was a fraudulent conveyance. What do you do next?

MR. ROSENBLOOM: Let me step back. I believe the controversy that most clearly exists and is clearly distinguishable is the controversy between the committees and the members of the committee and the debtor as to the underlying merits of the fraudulent conveyance litigation and the appropriateness of the debtor's conduct so far.

We've heard at least twice today, it's been suggested that the debtor has actually breached its fiduciary duties. Nothing could be more plain to be a controversy with real substantially different interests. The question is, is that controversy susceptible to treatment by a declaratory judgment action or is it susceptible to treatment by this motion that has been suggested, a motion to appoint an examiner.

I'll suggest to the Court that whatever the hearing, the hearing Mr. Purch suggested to create a record to justify the appointment of trustee or the hearing that would follow from Mr. Bernick's suggestion of a declaratory judgment action, those are probably going to look like very similar evidentiary hearings. It's the same question. So, the issue that comes down to is does the committee or the members of the committee have the capacity to be sued such that Grace can begin its declaratory judgment to bring forward what is clearly a controversy, and I believe nothing in Cybergenics casts down on all of those cases which had

found and even assumed the ability of committees to litigate.

Cybergenics addressed the ability of a committee to initiate an action under a specific statute which limited the entities that could bring an action under that statute, nothing more, nothing less. The committees are not one of the entities listed in 544.

Cybergenics notably preserves a long line of cases which found intervention as a matter of right for committees. It is hard to understand how a committee to intervene as a party intervention, as party intervention plaintiff or defendant, has a matter of right to be heard. This is part of the committee's right under 1109 to raise issues and be heard on issues if they didn't have the capacity to participate in other adversary proceedings other than the 544 proceeding for money damages that Cybergenics condemns.

So, if I understand Mr. Bernick's suggestion, which is a declaratory judgment proceeding, that doesn't necessarily have to contemplate in and of itself the recovery of money but, instead, just the declaration of the rights.

The issues raised by both Cybergenics and Mr. Wasserstein should not form impediments to this Court finding justiciable controversy.

The other question is how do you get Sealed Air in? Who's got a claim against Sealed Air? One of the things we've been looking at is Rule 19, clearly a party-in-interest at least as to Fresenius, if that's how the case came to us, we would agree to consent. We are a proper Rule 19 party and whether the debtor brings us in as a party or a committee or a member of the committees or another committee, we think that that much more than the other procedure that is currently before the Court provides us the opportunity to quickly litigate on the merits and obtain, if there's a favorable ruling in our favor, the benefits of that ruling to assert in other actions.

That is why we think that if the Court finds that the controversy which is undeniable between the debtors and the committees is, in fact, susceptible to a declaratory judgment action as opposed to just the motion, there will be ways to at least bring us in. We would not want to sit on the sidelines of that hearing, and I think they could bring in parties like Sealed Air or other transferees.

We have left aside today I think wisely the issue of what will we do with Owens-Corning type situations if there is a trustee. What is the mandate going to be and so forth. I don't raise those.

THE COURT: Owens-Corning is also operating under timeliness in view of the statute of limitations which runs

like the first week of October, where that's not the case here.

MR. ROSENBLOOM: I agree, and actually would like to point out we would hopefully and certainly assist the Court in making a sufficient effort to concluding any such declaratory judgment proceedings prior to the April date, which is the Owens-Corning analog, April 2nd, 2003.

I would also add that a declaratory judgment is not mutually exclusive with some of the other suggestions. It's like my grandmother used to say about chicken soup, it couldn't hurt. All these other things are going on. You could have a declaratory judgment, hear the evidence about the merits of the underlying actions and it could inform the Court's position on the decision it's going to need to make and the record it's going to need to make on a trustee, and I'm concerned about the record because so much has been said about it's so obvious that these actions are in the interest of the estate.

I think Grace's position is, in fact, one that's brought about after reflection in an exercise of what they believe to be the proper exercise of their fiduciary duties and the simple potential of money recovery ought not blind any other reviewing court as to the underlying substance of the Grace position or as to the positions of the other transferees.

I did promise to be brief, unless the Court had any questions about our position.

THE COURT: No. Mr. Baena, you want to be heard?

MR. BAENA: Maybe it please the Court, we actually may have accomplished more today, your Honor, than I expected. I do think that there was some forward-going proposals and discussion by the parties but let me get rid of first those that I don't think were forward.

THE COURT: I've been looking for a fog cutter.

MR. BAENA: Let me cut through the fog that Mr. Bernick left behind in his tall shadow.

THE COURT: See, they're not beating up on you now, big, small or indifferent. It's atmosphere.

MR. BAENA: As the day goes by and the sun moves, his shadow gets smaller. Your Honor, what Mr. Bernick describes is not a 544 action at all. What he describes, and Cybergenics clearly only involves a 544 action, an action to avoid transfers, and what he describes is not a 544 action. It doesn't get us to a monetary judgment. It begs the issue, and the way he lards it up with these additional accoutrements, like we'll throw in some zonolite claims, well, as Mr. Bernick well knows, we had an issue similar to that in the science trial on the zonolite claims.

He filed proofs of claims for those claimants on behalf of the debtor as the Court determined he was allowed

to, and he used them as the centerpiece of a science trial to debunk the claim that zonolite is harmful, and as part of the process he tried to rule out, he suggested that the committee ought to represent those zonolite claimants that he picked from among the class representatives or punitive class representatives in the course of that litigation, and the committee took the position, Judge Fitzgerald didn't view it differently than the committee articulated the position, that a committee, an official committee, has no statute to represent an individual claimant. We can't do that.

So, as he lards this up with zonolite claimants, he's going to lard this up with zonolite lawyers and this case is going to take on a completely different complexion.

Moreover, the relief that would come out of that if somehow he could get us to the right point, the relief that comes out of all of that is squarely within the commentary of the Third Circuit in footnote 17 to the Cybergenics opinion, where the Court describes why you don't -- why committees don't want individuals to be at the epicenter of these kind of claims, because it changes the entire legal landscape. It changes the amount of damages. You have to proof up their claims and the amount of damages that they're entitled to in terms of a fraudulent transfer are limited by the amount of each claimant's claim. It throws into serious

question how we apply your standards opinion, and I really think it's a non-starter.

The notion of an examiner, as you well know, was one that both personal injury and property damage argued to you at the last time you had a status conference about this whole issue as being a viable alternative, and we argued in our submission to the Court, it was requested by the Court, that there is authority for it but there's a problem with it, too. And if we're looking for finality, that problem may be enough of a problem not to pursue that alternative and that is, as crazy as it sounds, trustees and debtors-in-possession have a bundle of things given to them under the bankruptcy code which are broadly enumerated as rights, powers and duties and, unfortunately, when you get to the provisions concerning the appointment of an examiner and the expansion of what they can do, it only refers to duties, and there's a serious legal question as to whether the right to bring a lawsuit is a power or a right as opposed to a duty.

Some might argue that you can't have a duty without having the power, but we don't want to have that argument. The Court wants to avoid that.

Mr. Wasserstein, now I'm going to find myself agreeing with him, making this whole thing rather unusual.

THE COURT: I take it not on the motion to dismiss.

MR. BAENA: Not on the motion to dismiss, but I do

find it forward going that there is agreement between us that to live within the contours of Cybergenics without appearing to be too cute, and that's what I think we were concerned about when we made our submission to the Court, that whatever we do here, we certainly want to be entirely respectful to the Third Circuit and we certainly don't want to come up with some cute way of thumbing our nose at the opinion that was issued by them in Cybergenics.

So, the problem, of course, is the obvious one. We don't want to have this case dismissed, take that dismissal up on appeal and find out a year and a half from now that whatever we find out, we will find out much too late. I don't think it engenders a decision promptly. That reaches the second objective that the Court has, which is not just finality but that we move this along promptly and not waste the resources that have already been expended.

If Sealed Air is truly interested in finality, then it could go ahead right now and appeal the Court's order, just as you invited us to do. It could appeal the Court's order setting this trial. They have a pedestal for an appeal and they could argue whatever it is they wish to argue, but I suspect they don't want to take that option. They rather hold that one until the end of the case.

THE COURT: They'll consent to anything as long as they can reserve their right.

MR. BAENA: Reserve everything, that's correct. It seems to me that the real -- oh, and let me deal with Mr. Rosenbloom's comments. When I was rereading Cybergenics for about the 400th time, I was sort of getting excited like he seems to have about the fact that the Court kept talking about initiate, initiate, and I was hoping maybe initiate means something else, means like just following the lawsuit and then you can sort of disappear, but it's very clear from the opinion, particularly towards the end of the opinion where the word "initiate" is used interchangeably with the word "prosecute" and other synonyms that indicate that there's a continuing presence, that the Third Circuit didn't anticipate that the debtor would file the suit, just file the suit and go away.

THE COURT: You know, you're experienced in bankruptcy matters. What's the likelihood of a debtor-in-possession in a fraudulent conveyance action initiating the action?

MR. BAENA: It happens every day, Judge. It happens.

THE COURT: Debtors-in-possession doing it?

MR. BAENA: It happens, particularly where the debtor has no other exit strategy from bankruptcy and because it doesn't have the resources to reorganize. Debtors do file them. We file those actions. I filed them

when I was Mr. Kruger's partner. Our firm filed those kinds of actions. It happens.

Can I generalize from that? No, I can't, because, obviously, the ugly part is, and it's the ugly part of Cybergenics, ybergenics even remarks it's kind of ugly to let the architect of a fraudulent transfer also be the gatekeeper for the litigation, but then they say, tough, in practice, unless Cybergenics, and even this circuit I didn't think the answer was tough, and indeed, debtors pursue those actions from time to time. When they didn't, they were no longer the gatekeeper. That was the simple evolution of things.

Cybergenics creates a problem and we're waiting to find out whether it's a permanent problem. That's exactly where we are.

THE COURT: Let me ask you this question, and I'm probably going to ask the same question of Mr. Wasserstein as I've been sitting here listening. Substantively, what's the difference between, other than what Cybergenics says but, substantively, what's the difference between the trustee bringing the action or the committees bringing the action, if any?

MR. BAENA: Without Cybergenics being a factor in my answer?

THE COURT: Yes.

MR. BAENA: Substantively, I don't see a difference. The undercurrent, I suppose, is the extent of our respective fiduciary duties.

THE COURT: I guess what I'm really asking is what does Mr. Wasserstein think that he's sacrificing if we were to consent to the committees bringing the action where we are now as opposed to removing Mr. Bernick and company, appointing a trustee to bring the same action?

MR. BAENA: From Sealed Air's perspective, I can't imagine what they think they're giving up. There may be some really esoteric argument that creditors might have with an estate about vis-a-vis the unsecured creditors versus the asbestos claimants, do we have the same fiduciary duties that a trustee has to their constituents, so, if we make a mistake in this litigation, we're somehow held accountable to their constituency as well.

We know a trustee is held accountable to all constituencies, but none of them, in my judgment, impacts Sealed Air. And I think you've made it abundantly clear and I think we've made it abundantly clear as well, they're getting sued. There's no doubt about it. They're going to trial with somebody as a plaintiff. You know, in some places you want to get that fight on the road and other places you want to take your time.

THE COURT: Are they just being difficult to be

difficult because delay potentially works in their favor?

MR. BAENA: Well, I too feel a little bit awkward telling the Court what I think they're doing in a public forum. I would gladly do so at side bar with them there. I just don't think the media --

THE COURT: Did you see that last row back there? That was the press.

MR. BAENA: Well, it's worse than that. We've got traders out there and we view them as the golden goose and we don't want to kill them.

THE COURT: When you say "traders", you mean t-r-a-d-e-r-s.

MR. BAENA: We've got both kinds in the room. But here's what we see as a very simple formula that emerges from all this conversation. Mr. Bernick is happy to go. He's had an opportunity to do whatever damage he sought to do. He's happy to leave. He's certainly happy not to be in Newark during, if we accommodate Mr. Inselbuch, Christmas.

This case ought to proceed as it is with the exception that the debtor is out. The committees will prosecute this lawsuit just as the committees are prosecuting this lawsuit right now. The debtor is out. Kirkland & Ellis is out. We ought to take Mr. Bernick's invitation and RSVP that we accept it.

THE COURT: I don't know if he made that

invitation.

MR. BAENA: He's getting pretty close.

THE COURT: I suggest to him a slow boat to China. Are you old enough to remember that?

MR. BAENA: Yes, I am, and I know a variation that I used to sing in the army.

THE COURT: That's all right.

MR. BAENA: The committees, and there's a slight variation on what Mr. Inselbuch suggested, the committees ought to be allowed to file their motion for the appointment of a trustee, but we would ask that you not rule on them. Let's go to trial. Let's see what happens with Cybergenics. If Cybergenics comes back and says, sorry, the en banc decision is, sorry, got it all wrong, then all we have to do is Rule 17 substitution party. Even if we completed the trial, we can substitute the trustee in, and 17 is incorporated into the rulings of bankruptcy procedure under --

THE COURT: That's like me holding the trial, then if I think the Third Circuit is going to go the other way, I say, well, I'll vacate my opinion.

MR. BAENA: Maybe. Again, maybe not everything was bad in Cybergenics. The Court went out of its way to disabuse even the transferee of the notion that this was a standing --

THE COURT: I have to believe that there was a purpose that the Third Circuit held in the manner they did. Okay.

MR. BAENA: I believe that, too.

THE COURT: Whatever the purpose may be, I'm not going to verbalize it, but they had a purpose, just didn't happen itinerant. Okay.

MR. BAENA: In the same theory, Judge, they made a distinction between standing and real party-in-interest and that's a very material difference under Rule 17, because standing means we could have never brought the suit. Real party-in-interest means that somebody ought to be substituted in to bring that suit, but we may decide, the Court may decide I'm going forward on this, I'll see what happens en banc, and if it is determined, first of all, the committees are protected from any professional claims that can be asserted against them for not having the motion for appointment of a trustee, and I think we got to be very concerned about that since it doesn't appear that the Third Circuit protects those who practice in this courtroom, so, the committees ought to have that opportunity.

The Court can go forward with the trial. If the Third Circuit en banc says, no, we're not changing our mind, that's exactly what we meant, then the Court, depending, we could even be finished with the trial at that point in time

and it doesn't affect the judgment that was obtained. You just substitute the trustee at that point in time for the holders of the judgment.

THE COURT: Maybe the simple answer is we're getting too complex. I set a trial date and everybody mandamus me. You can't hold that trial, Cybergenics prohibits it. Maybe that's the answer.

MR. BAENA: I guess I have a question of the Court and, that is, I've been operating since you first said it under the assumption that we don't file any motions here unless you tell us we can.

THE COURT: That's good thinking.

MR. BAENA: And we haven't. But we want to know if that applies to a motion for the appointment of a trustee.

THE COURT: No.

MR. BAENA: So, we're free to file motion for the appointment of a trustee?

THE COURT: Absolutely, as long as you do it promptly.

MR. BAENA: That would be before Judge Fitzgerald in this case unless the Court withdraws the reference as to that motion if and when it's filed --

THE COURT: We withdraw.

MR. BAENA: -- we have to deal with that.

THE COURT: We withdraw the reference.

MR. BAENA: Okay.

THE COURT: You've got two days to file it, like Mr. Wasserstein agreed.

MR. BAENA: Okay. I think it's become simple, Judge. Let's go forward. Let's just go forward on the 2nd. We'll file our motion. Don't rule on it yet. Let's see what happens and --

MR. INSELBUCH: Did you say we have two days to file this motion?

THE COURT: Can you?

MR. INSELBUCH: Which two days?

THE COURT: You know, that's like the old Henny Youngman joke, my wife and I go out to dinner twice a week. She goes Tuesdays, I goes Thursdays.

MR. INSELBUCH: I just wanted to make sure today wasn't one of the two.

THE COURT: No. How about by Friday?

MR. BAENA: File it in this court?

THE COURT: Yes.

MR. BERNICK: Then we would have how long to respond?

THE COURT: File simultaneously. You know what they're going to say. As a matter of fact, you probably already have it drawn up.

MR. BAENA: The relief being going to seek --

MR. INSELBUCH: There is now an order in place that the trial will resume on December 2nd?

THE COURT: Oh, we're going to issue one.

MR. INSELBUCH: So, this motion to appoint a trustee can be made in light of that order?

THE COURT: That's correct. That's correct. That's the only order that you can really count on is we're going to go forward on December 2nd. There will probably be more contained in it.

MR. BAENA: It would be the property damage committee's intention, if it didn't have consensus with the personal injury committee, to file a motion also asking the Court not to hear the motion until we determined whether or not it's necessary.

THE COURT: There you and the personal injury claimants may fall out of bed.

MR. BAENA: We haven't so far. We really behaved ourselves.

MR. KRUGER: Are you talking about a plenary trustee or just limited purpose?

MR. BAENA: We believe there's authority for limited trustee.

THE COURT: I thought you were talking about a plenary trustee.

MR. BAENA: We'll ask both ways alternatively.

MR. KRUGER: Do we have an opportunity to respond after the papers have been filed by both sides?

THE COURT: No.

MR. KRUGER: We have to file by Friday as well?

THE COURT: I want to get on with this process. I don't want to elongate the process. I want it to end.

MR. KRUGER: Are we going to presume, your Honor, that this trustee will indeed commence this litigation rather than having the obligations of a trustee to examine into the facts and all the rest that goes with it? I mean, I want to understand what it is that I'm supposed to be arguing about.

THE COURT: Talk to Mr. Inselbuch later and he'll tell you what he's going to do.

MR. BERNICK: As I understand, the proposal is to make the motions and have the Court hold the matters in abeyance until some later point in time.

THE COURT: I didn't say that. That's what Mr. Baena said.

MR. BERNICK: I guess the only thing we can do is let's see what they file. I can anticipate a lot of what they're going to say but I can't anticipate what they're going to say particularly about when this matter should be taken up, and what we'd like to have is a couple days to at least look at what they have to say and file a response.

THE COURT: Likewise, on your way out, in the hallway talk to Mr. Baena. He'll lay it out for you. He'll tell you exactly what he's thinking, just as he said here. You know he's going to make application for a trustee or potentially a limited trustee and the Court should not rule on it until after the hearing. Okay? What more do you want to know?

MR. BERNICK: That's fine. I'll speak with Mr. Inselbuch as well to find out what his --

THE COURT: You have his telephone number. I know that from prior argument.

All right. Mr. Wasserstein, I posed the question to Mr. Baena. I want to pose the same question to you. What is the difference between -- you're going to be a defendant regardless.

MR. WASSERSTEIN: Yes, sir.

THE COURT: What's the difference between having the committee bring the action or appointing a trustee to bring the action substantively to you?

MR. WASSERSTEIN: An eight-letter word, finality.

THE COURT: Okay.

MR. WASSERSTEIN: If the committee brings the action and I win, which is the same position I presented to your Honor on September 24th, I have no assurance that that action is going to -- that that result is going to stand up

and that it's not going to be attacked collaterally by some other creditor, somebody else, some way, somehow, and that is the concern that I have and that is the difference.

THE COURT: Is there any consent that they could offer to you that would allay that fear?

MR. WASSERSTEIN: Every asbestos person, every asbestos claimant in the world would have to consent to that, Judge, and that I'm not even sure would be enough. The government might have to consent. I can't begin to tell you.

THE COURT: All right. I just didn't want to leave here today and the reason I posed the question thinking that your lack of consent was arbitrary to delay the process.

MR. WASSERSTEIN: Oh, no, your Honor, not at all. And that's why I said that if this could be determined some way where the Third Circuit were to say that a limited purpose trustee is okay to bring this case and to confer the jurisdiction, that would protect me. I don't have a problem with that.

THE COURT: Can I appoint a trustee who would then hire Milberg, Weiss together with the committees to prosecute the action?

MR. WASSERSTEIN: I think I have a problem with it. I'd have to think a little bit more about it. I do have the concerns that I have had contact with some of the people at

Grace, if they are representing Grace, we've had these common interest discussions.

THE COURT: What if I took Mr. Baena's Rule 17 and I substituted a trustee for the committees?

MR. WASSERSTEIN: I don't follow you, your Honor.

THE COURT: What if I appointed a trustee -- okay -- and the trustee then took over the prosecution from the committees to have a right to intervene.

MR. WASSERSTEIN: I think I have the same problem as far as counsel is concerned.

THE COURT: So, you still object to Milberg, Weiss proceeding?

MR. WASSERSTEIN: I believe I would, sir.

THE COURT: Because?

MR. WASSERSTEIN: On the same ground they have access now to all of the common interest matters that I have had with Grace principals.

THE COURT: Well, wouldn't the trustee ultimately get exposure to all of those?

MR. INSELBUCH: We should have had that from the beginning.

MR. BAENA: In other words, they did it wrong in the first instance, your Honor, and if Cybergenics is right, we did it wrong in the first instance, if we do it right and he shouldn't be involved and the estate shouldn't have

aligned itself with Sealed Air, which is clearly the implication of Cybergenics, the committees and the trustee shouldn't benefit from it. That's ridiculous. It was their mistake.

THE COURT: One person at a time.

MR. BERNICK: Judge Dreier delimited those privileged matters that we had to give up that are germane to the case. This was litigated specifically and unless he screwed up on that, which I don't think that he did, the parameters of privileged communications and the like that are available to whoever it is that prosecutes this case have already been defined, so, I don't understand Mr. Wasserstein's point, somehow there's privileged communication that somehow would be compromised here.

The line has already been drawn and I don't understand Mr. Baena would be somehow hurt in the process because the Milberg firm got whatever Judge Dreier thought was necessary to prosecute the case.

THE COURT: Excuse me. One moment. We should permit Mr. Wasserstein to continue. What is the conflict with the trustee hiring Milberg, Weiss, which would seem to be efficient, would seem to conserve estate assets, rather than having a trustee have to hire new counsel to come up to speed?

MR. WASSERSTEIN: If Mr. Bernick is correct that it

would not impact any privileged communications, then I probably don't have a problem with it.

THE COURT: Let me ask you this. Will you consent -- I know you won't consent to -- would you consent to the appointment of a trustee to retain Milberg, Weiss to prosecute the action?

MR. WASSERSTEIN: With what limitations placed upon information that could go from Grace employees to the trustee to Milberg, Weiss?

THE COURT: Well, how would that differ from what Milberg, Weiss has already ascertained from Grace employees to the discovery?

MR. WASSERSTEIN: To the extent it has obtained information through discovery, I have no problem with that, Judge, none whatsoever.

THE COURT: What if I were to create some type of standstill as to the parties are in today as they would have been on September 30 to prosecute the action?

MR. WASSERSTEIN: It probably would work.

MR. FRIEDMAN: Judge, for what it's worth, I think the issue that Mr. Wasserstein is raising would be the same issue one way or the other, whether it was Milberg, Weiss or any law firm. A law firm brought in tomorrow brand new, it would be the same issue.

THE COURT: Generic.

MR. FRIEDMAN: Generic. It has nothing to do with Milberg, Weiss.

THE COURT: No. And I didn't mean Milberg, Weiss.

MR. FRIEDMAN: We don't currently possess any information that would conflict us out. We don't currently have access to any Sealed Air defense strategies or anything else.

THE COURT: Other than you've gained through discovery.

MR. FRIEDMAN: Public discovery.

MR. WASSERSTEIN: I think what Mr. Friedman is saying is correct. It's a generic problem as opposed to a Milberg, Weiss problem.

THE COURT: So, is the answer here now that the committees move to appoint a trustee. I grant the application. Mr. Bernick is graciously willing to go home and the trustee retains Milberg, Weiss to prosecute the action. The committees can intervene and represent themselves pro se and the case moves on?

MR. KRUGER: Is this a limited purpose trustee? Do we get to vote for the trustee? I think we're going a lot too quickly.

THE COURT: Well, you raise a good question but it's an impediment. I would think it's a full purpose trustee and I know it's not my appointment. I would only

authorize the appointment of trustee and we'd have to get the U.S. Trustee to step in.

MR. KRUGER: This is the decision that would be made on the eve of trial --

THE COURT: On the eve of trial?

MR. KRUGER: -- or is this a decision that's going to be made now?

THE COURT: Well, I'm not making it now but it could be made next week.

MR. KRUGER: Based on a trial with respect to the facts determinative whether or not a trustee should be appointed, because in all due deference, while this is an important issue, it is not to my mind the only issue in this case. I'm concerned about having a trustee appointed just sort of in this fashion because we want to deal with the Third Circuit issue. There is the whole business of whether this company will run with a plenary trustee in place. Will suppliers continue to do business with them. Will the banks continue to extend credit. Those are issues that, quite frankly, override the question of whether or not Sealed Air should --

THE COURT: U.S. Trustee wasn't too concerned.

MR. KRUGER: That's nice, because they don't have the interest of trying to protect the creditor interest. They're only interested in protecting their record, so to

speak.

THE COURT: By the way, don't you have appointment in the trustee, because you're the only one with liquidated claims. You're the only one that can vote.

MR. KRUGER: I don't know that's true, your Honor, but it does seem to me that the trustee, if we're going to have a plenary trustee, number one, gets to pick their own counsel, not anybody else's selection of counsel. That's an independent issue for the trustee. Whether or not the trustee wants to conduct an examination to determine whether or not this is an action worth prosecuting is a separate issue for a trustee.

I mean, it just seems to me we're going to talk about a plenary trustee --

THE COURT: Do you really think that a trustee who would be appointed here would walk away from this litigation?

MR. KRUGER: I'm not sure, your Honor, that I want to prejudge it for a trustee because then they've lost whatever independence they're supposed to have and I have no confidence in the result.

MR. BERNICK: If your Honor is seriously saying we're going to entertain a plenary trustee for this case, obviously, Grace is not agreeable to that, and if that is what your Honor seeks to do, then we're going to need

some --

THE COURT: You know what my MO is, Mr. Bernick? When you read all those things in those judge books about the American judiciary, you never know what he's thinking and you know what, because I don't know what I'm going to do.

MR. BERNICK: I thought we were going down the path as you discussed it which was that if we had a limited trustee for purposes of prosecuting the claim against Sealed Air, that the privileges as they stood, what privileged information was necessary to prosecute the case per Judge Dreier's order was in place, that, therefore, you had the latitude, the trustee would have the latitude to retain Milberg, Weiss, that Sealed Air could take the position that there had been -- that there was a joint defense, information that was now in the hands of the adverse party, that we're out of the case, therefore, we don't have to worry about collateral estoppel issues, and the only thing I was going to stand up to say is we can't have arguments that what the trustee says are judicially usable in the Chapter 11 case, although the evidence can be usable in the Chapter 11 case. I thought we actually sounded pretty close. But then my colleague over here asked one question too many. Are we saying now this is a plenary trustee and we got going down --

MR. WASSERSTEIN: Your Honor, we would also at that point wish to move to seek an appeal on your 1292(b).

THE COURT: Well, I hope somebody does. I'm trying to encourage you.

MR. WASSERSTEIN: I'm not as concerned with regard to the trial date as I am concerned with the authority of the Court to granting a special, a limited purpose trustee under 1292(b).

THE COURT: I have to tell you, it's not my first choice. Okay. And I'm enamored of other things more than that.

MR. INSELBUCH: One small point. You know, I didn't want to sit here silently why Mr. Bernick keeps saying that if his intervention is removed from this case, that that's the end of the collateral estoppel.

We would still urge whatever arguments we might urge at some point about collateral estoppel and, of course, it would be for the Court to decide those issues.

THE COURT: I hope I didn't provide him with any solace from something I may have or may not have said.

MR. INSELBUCH: But I think the bottom line here, everyone expressed their view, we have to tee something up in the Third Circuit.

THE COURT: I think we made a good record today.

MR. INSELBUCH: I think we have displayed for the

Third Circuit the conundrums that they've placed on how many pieces of litigation that are pending in the Third Circuit, several hundred, but am I still to understand that your Honor is going to enter an order that the case will go to trial on December 2nd and that we are under all of the instructions to file our motion with respect to the appointment of the trustee by Friday and everyone can simultaneously respond to that?

THE COURT: That's correct.

MR. INSELBUCH: I can say for everyone's benefit, I believe, and I'll advise them if we change our mind, that given what the U.S. Trustee has had to say about the lack of authority for something less than a plenary trustee, we would be constrained to ask for a plenary trustee, mindful of the issues that the unsecured creditors' committee raises, simply because we would have to have something in front of the Third Circuit that would fit squarely within the Cybergenics language.

THE COURT: Do you think that when Mr. Kruger months ago declined on behalf of the unsecured creditors to bring this action, he was prescient?

MR. INSELBUCH: No, no, just chicken.

MR. BERNICK: I will say, your Honor, this goes back to one of the first hearings in the case when the issue of this kind of claim came up, and there was somebody who

said why don't we have an examiner.

THE COURT: All right. I've nothing further. If everybody has had an opportunity to be heard, we will be in recess.

(Whereupon, the proceedings are adjourned.)